

No. 12910

United States
Court of Appeals

for the Ninth Circuit

CARL RUDEEN,

Appellant,

vs.

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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OF RECORD

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In the Circuit Court of the State of Oregon in and
for the County of Klamath

Equity No. 9279

R. G. LILLY and M. M. VALENTINE, doing busi-
ness under the assumed name and style of Lilly
& Valentine Trucking Company,

Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a
corporation, and CARL RUDEEN, and Klamath
County, Oregon, a municipal corporation;

Defendants.

COMPLAINT

Comes now the plaintiffs and for cause of suit
against the defendants, and each of them, complains
and alleges as follows, to-wit:

I.

That at all times mentioned herein the plaintiffs
were, and they now are, doing a general hauling
and trucking business in the state of Oregon, as co-
partners, under the assumed name and style of Lilly
& Valentine Trucking Company.

II.

That the defendant, Great West Lumber Corpora-
tion, was and it now is, a corporation organized and
existing under and by virtue of the laws of the State
of Oregon.

III.

That on the 4th day of August, 1948, the defendant, Great West Lumber Corporation, for value, made, executed, and delivered its promissory note in words and figures as follows, to-wit:

“\$10,000.00 Installment Note August 4th, 1948

For value received I promise to pay to the order of R. G. Lilly and M. M. Valentine Ten Thousand and No/100ths Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of six per cent per annum from date until paid, payable in two installments of not less than \$5,000.00 in any one payment, together with the full amount of interest due on this note at the time of payment of each installment. The first payment to be made on the 15th day of September, 1948, and a like payment on the 15th day of October, 1948, thereafter, until the whole sum, principal and interest, has been paid; if any of said installments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. In case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Total due October 15th, 1948 at Klamath Falls, Oregon.

(Signed) Great West Lumber Corporation,
A corporation,

By R. O. Camozzi, President and
General Manager.”

IV.

That to secure the payment of said promissory note the defendant, Great West Lumber Corporation, made, executed, and delivered a mortgage, a copy of which said mortgage is attached hereto and marked "Exhibit A" and referred to, and by said reference made a part hereof. That said mortgage was duly recorded in the office of the County Clerk of Klamath County, Oregon, on the 5th day of August, 1948, in Book 120, page 98, Records of Mortgage of said County.

V.

That said mortgage by the terms thereof provided and now does provide that the defendant, Great West Lumber Corporation, transferred to the plaintiffs herein the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ Section 13, Township 23 South Range 9 E.W.M. and a complete sawmill installed thereon with buildings consisting among other things as follows:

2 circular saw head rigs; edger; automatic trim saw; conveyor; conveyor chains; numerous engines and other equipment in connection therewith, as security for the payment according to the terms thereof of said promissory note;

and that said Exhibit A constituted, and now does constitute, a mortgage upon said property.

VI.

That the defendant, Great West Lumber Corporation, has wholly failed, and refused to pay said amount specified in said promissory note, and any amount thereof, except the amount of \$300.00, which

has been paid, and there is now due, owing, and unpaid to the plaintiffs from the Great West Lumber Corporation, defendant herein, the amount of \$9,700.00, together with interest thereon at the rate of six per cent per annum from and after the said 4th day of August, 1948, until paid.

VII.

That the defendant, Carl Rudeen, claims some right, title, interest and lien in and on the property set forth in plaintiffs' Exhibit A, but that said lien and claim is, if any, inferior in time and right to the plaintiffs' lien upon said property, and that plaintiffs' lien is superior to said claim of the defendant, Carl Rudeen.

VIII.

That at the time and place of execution and delivery of promissory note and Exhibit A, it was intended to and did secure the payment of said promissory note, but because plaintiffs did not know at the time of execution of said instruments, and not knowing at this time, the exact description of the complete sawmill and equipment installed therein, plaintiffs desire the Court, when obtained, to reform the same with a full and complete description of all items of property intended and included in said lien, and a description of all the items of personal property located therein.

IX.

Said promissory note and mortgage provided, and now does provide, that in case suit or action is instituted to enforce plaintiffs' rights thereunder, that

the defendant, Great West Lumber Corporation, will pay such sum or sums as may be adjudged reasonable as attorneys fees in said suit or action by the Court, and that it has become necessary for these plaintiffs to employ an attorney to bring this action, and that the amount of \$2,500.00 is a reasonable amount to be allowed as attorney fees in said suit or action.

X.

That the property secured by said mortgage is a complete sawmill and equipment located in the northern end of Klamath County, Oregon, in an isolated area and district and is without any person to preserve and protect the property and that the defendants herein have so conducted said business of said sawmill as to cause the same to become and be totally insolvent and unable to operate the same during the forthcoming season, and the same will not be operated by the defendants, but will remain idle, unattended, and subject to vandalism and destruction, and the plaintiffs' securities will thereby be lost, impaired and destroyed.

XI.

That a receiver should be appointed to preserve said property, and do any and all things ordered by the court, and that plaintiffs herein are capable and qualified to act as receiver upon said property and it will be necessary for them to employ a caretaker to protect said property, and that the plaintiffs be authorized and directed to employ another person as caretaker to protect said property, and the whole thereof.

XII.

That at all times mentioned herein Klamath County, Oregon, was and it now is a municipal corporation and subdivision of the State of Oregon.

XIII.

That Klamath County, Oregon, claims a lien for taxes upon some, or all, of the property herein and that the validity of said lien be determined in amounts and be included in the judgment and sale of said property, and that the same be fixed in amounts and priorities.

Wherefore, plaintiffs' pray Decree of this Honorable Court as follows:

(a) Decree against Great West Lumber Corporation in the amount of \$9,700.00, with interest thereon at the rate of six per cent per annum from and after the 4th day of August, 1948, until paid; and in the further amount of \$2,500.00 as plaintiffs' attorney fees and costs of suit herein.

(b) That Exhibit A be declared to be a mortgage to secure the payment of said judgment, and that said instrument be reformed to include specific description of all personal property, included therein, and that the real and personal property be sold to satisfy said judgment.

(c) That said mortgage be declared to be prior in time and superior in and to any claim of Carl Rudeen and other persons.

(d) That the plaintiffs' herein be permitted to bid upon said property.

(e) That a receiver be appointed to preserve and protect said property and abide the order of the court in the conduct and disposition of said property.

(f) That the claim of the defendant Klamath County, Oregon, be determined and that the same be segregated and applied to specific properties, and that the liens of Klamath County, if any, which are prior to plaintiffs' lien, be paid.

(g) And for such other and further relief as to the Court may seem just and equitable.

/s/ U. S. BALENTINE,
Attorney for Plaintiffs.

“EXHIBIT A”

“This Indenture Witnesseth, that Great West Lumber Corporation, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Idaho and authorized to do business within the State of Oregon, with its principal office at Twin Falls, Idaho, party of the first part, for and in consideration of the sum of Ten Thousand and No/100ths (\$10,000.00) Dollars to it paid, the receipt whereof is hereby acknowledged, has bargained, sold and conveyed and by these presents does bargain, sell and convey unto R. G. Lilly and M. M. Valentine dba Lilly & Valentine Trucking Company, parties of the second part, all of the following described real estate, situate and being in the County of Klamath, State of Oregon, to-wit:

Exhibit "A"—(Continued)

NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 13, Township 23, South Range 9 East Willamette Meridian, and a complete sawmill installed thereon with buildings consisting among other things, as follows:

2 circular saw headrakes

Edger

Automatic trim saw

Conveyors

Conveyor Chains

Numerous gas engines and other equipment in connection therewith.

together with tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To Have and to Hold the same with the appurtenances unto the said R. G. Lilly and M. M. Valentine, their heirs and assigns forever.

This Conveyance is intended as a mortgage to secure the payment of the sum of Ten Thousand and No/100ths (\$10,000.00) Dollars, in accordance with the tenor of a certain instrument of writing, of which the following is a substantial copy to-wit:

"\$10,000.00 Installment Note August 4th, 1948

For value received I promise to pay to the order of R. G. Lilly and M. M. Valentine Ten Thousand and No/100ths Dollars at Klamath Falls, Oregon, in lawful money of the United States of America, with interest thereon in like lawful money at the rate of six per cent per annum from date until paid, payable in two installments of not less than \$5,000.00

Exhibit "A"—(Continued)

in any one payment, together with the full amount of interest due on this note at time of payment of each installment. The first payment to be made on the 15th day of September, 1948, and a like payment on the 15th day of October, 1948, thereafter, until the whole sum, principal and interest, has been paid; if any of said installments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. In case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Total Due October 15th, 1948.

Great West Lumber Corporation,
a corporation,

By (signed) R. O. Camozzi

President and General Manager"

Now, if the sums of money due upon said instrument shall be paid according to agreement therein expressed, this conveyance shall be void, but in case default shall be made in payment of the principal or interest, as above provided, then the said R. G. Lilly and M. M. Valentine and their legal representatives may sell the premises above described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, retain the said principal and interest, together with the costs and

Exhibit "A"—(Continued)

charges of making such sale, and a reasonable sum as attorney's fees, and the overplus, if any there be, paid over to the said Great West Lumber Corporation, its successors or assigns, and the said party of the first part, for itself, successors and assigns, does covenant and agree to pay to the said parties of the second part their successors or assigns the same sum of money as above mentioned.

In Witness Whereof, Great West Lumber Corporation, a corporation, party of the first part has caused its lawful corporate seal to be hereunto affixed and its name to be hereto subscribed by the hands of its president and General Manager this 4th day of August, A.D., 1948, at Portland, Oregon.

Great West Lumber Corporation,
By (signed) R. O. Camozzi
President

State of Oregon
County of Multnomah—ss.

On this 5th day of August, A.D., 1948, before me, appeared R. O. Camozzi, to me personally known, who being duly sworn, did say that he, the said R. O. Camozzi is the President, and he, the said R. O. Camozzi is the General Manager of Great West Lumber Corporation, the within named corporation, and that the seal affixed to said instrument is the corporate seal of said Corporation, and that the said instrument was signed and sealed in behalf of said Corporation by authority of its Board of Directors, and said R. O. Camozzi acknowledged said instru-

Exhibit "A"—(Continued)

ment to be the free act and deed of said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this, the day and year first in this, my certificate written.

(signed) D. A. Empfield

Notary Public in and for said County and State:
My Commission Expires 8/10/51."

In the United States District Court for the
District of Oregon

Civil No. 4401

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,

Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a corporation, and CARL RUDEEN, and Klamath County, Oregon, a municipal corporation,
Defendants.

ANSWER AND CROSS-CLAIM OF
DEFENDANT CARL RUDEEN

First Defense

Defendant Carl Rudeen denies each and every allegation contained in Plaintiffs' complaint except answering Defendant admits the allegations con-

tained in Paragraphs I and XII thereof, admits that on August 4, 1948, a purported note and mortgage were given, admits that said purported mortgage was recorded, and alleges that R. O. Camozzi, who attempted to execute said purported note and mortgage on behalf of Great West Lumber Corporation, executed the same without any authority, actual or apparent, so to do. Answering Defendant further admits that he claims ownership of the real and personal property described in the complaint.

Second Defense

And indebtedness of Great West Lumber Corporation represented by said purported note has been fully paid and satisfied.

Third Defense and Cross-Claim

I.

The Plaintiffs R. G. Lilly and M. M. Valentine are residents of the State of Oregon carrying on a motor transportation business in said state under the name and style of Lilly & Valentine Trucking Company.

II.

Answering Defendant is a resident of the State of Idaho and Defendant Great West Lumber Corporation is a corporation organized and existing under and by virtue of the laws of the State of Idaho.

III.

On and prior to January 27, 1949, Defendant Great West Lumber Corporation was the owner of record of the following described real property situate in Klamath County, Oregon, to-wit:

The Northeast quarter of the Southeast quarter (NE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 13, Township 23 South, Range 9 East of the Willamette Meridian.

IV.

On and prior to January 27, 1949, the Defendant Great West Lumber Corporation was the owner of a complete sawmill situated upon the above described real property.

V.

Defendant Great West Lumber Corporation has incurred liability for United States Internal Revenue taxes and prior to August 4, 1948, there were filed with the County Clerk of Deschutes County, Oregon, notices of liens for said unpaid taxes owing by said Defendant.

VI.

All of the personal property incorporated in the sawmill of Great West Lumber Corporation upon said described real property was physically present in Deschutes County, Oregon, after the filing of said notices of tax liens and prior to August 4, 1948, by reason whereof said tax liens attached to said personal property prior to August 4, 1948.

VII.

Thereafter and between August 4, 1948, and January 27, 1949, notices of tax liens for United States Internal Revenue taxes due from Defendant Great West Lumber Corporation were filed with the County Clerk of Klamath County, Oregon.

VIII.

Thereafter, and on January 27, 1949, pursuant to notice, said real property, together with said saw-mill, was offered for sale by the United States Internal Revenue Service to satisfy said liens for United States Internal Revenue taxes. At said sale answering Defendant Carl Rudeen was the highest bidder for said real and personal property and purchased the same, including additional personal property, for the sum of Eight Thousand 00/100ths Dollars (\$8000.00).

IX.

Answering Defendant Carl Rudeen has received certificates of purchase for said real and personal property, is the owner of said real and personal property, is entitled to the possession, and is in possession thereof, subject only to the right of redemption of Great West Lumber Corporation.

X.

On August 4, 1948, R. O. Camozzi, then general manager and president of Great West Lumber Corporation, attempted to execute and deliver to Plaintiffs, upon behalf of Great West Lumber Corporation, a promissory note and mortgage (being those referred to in the complaint) for the purpose of securing Plaintiffs upon a pre-existing indebtedness then owing from Great West Lumber Corporation to Plaintiffs. At said time and place R. O. Camozzi had no authority, actual or apparent, to make, execute or deliver any such instruments on behalf of Great West Lumber Corporation, and the

same were and are not the acts of said corporation nor in any way binding upon it.

XI.

The Plaintiffs assert that said Mortgage, Exhibit A to Plaintiffs' complaint, is a valid mortgage upon said real and personal property and that it is prior in time to answering Defendant's interest acquired upon said tax sale. Said claims constitute a cloud upon answering Defendant's title and ownership to said real and personal property which should be removed by a decree declaring said mortgage to be wholly void and of no effect.

Wherefore, answering Defendant, having fully answered Plaintiffs' complaint, prays that the same be dismissed and that answering Defendant have a decree upon his cross-claim declaring his right, title and interest in said described real and personal property acquired under said certificates of purchase to be superior and paramount in all respects to the claims of Plaintiffs and cancelling of record the pretended mortgage of the Plaintiffs and removing the same as a cloud from the title of answering Defendant to said real and personal property, and for answering Defendant's costs and disbursements herein incurred.

/s/ LEADY & KEANE,

Attorneys for Answering Defendant Carl Rudeen.

Service by Mail attached.

[Endorsed]: Filed April 5, 1949.

[Title of District Court and Cause.]

ANSWER TO CROSS-CLAIM

Come now the plaintiffs and for answer to defendant Carl Rudeen's third defense and cross-claim admit, deny and allege as follows, to-wit:

I.

Replying to Paragraphs I, II, III, IV, V and VII thereof, plaintiffs admits the same.

II.

Replying to Paragraph VI, plaintiffs deny the same and further replying to said Paragraph VI, allege that if any of the personal property incorporated in the sawmill of Great West Lumber Corporation was physically present in Deschutes County, Oregon, after the alleged filing of notice of tax lien, that the same was not at such time as it might have been physically present in Deschutes County, Oregon, the property of Great West Lumber Corporation, and further replying to said Paragraph VI, plaintiffs allege that said property was removed from said Deschutes County, Oregon, with the obligations on the part of the United States Government or the answering defendant, and was located in the County of Klamath, State of Oregon, for long periods of time, the extent of which is not known to these plaintiffs, and that this answering defendant is estopped from claiming a lien which attached as a result of the filing of said notices in Deschutes County if any would and did, and that these plaintiffs were permitted to rely upon the

property being in Klamath County, Oregon, and in truth and in fact prior to the execution of the mortgage searched the records of Klamath County, Oregon, to determine whether or not any prior lien existed, including those liens, if any, of the United States Government.

III.

Replying to Paragraph VIII, plaintiffs admit that on January 27, 1949, the property of the Great West Lumber Corporation was offered for sale by the United States Internal Revenue Service to satisfy liens of the United States Internal Revenue taxes, and admit that the said answering defendant, Carl Rudeen, was the highest bidder at said sale for said real and personal property, and purchased the same together with additional property for the sum of \$8,000.00 and further replying to said Paragraph VIII, plaintiffs allege that the said answering defendant, Carl Rudeen, was advised at and prior to said purchase, of plaintiffs' lien and mortgage, and bought the same subject to plaintiffs' lien and mortgage and is estopped to allege the contrary, and further replying to said Paragraph VIII, these plaintiffs allege that the said Carl Rudeen on the 27th day of January, 1949, was an officer and agent of the Great West Lumber Corporation and was a duly qualified member of the Board of Directors of said corporation and purchased said property for the use and benefit of the Great West Lumber Corporation and not otherwise, and that the lien of the United States Government thereby became, was, and now is extinguished.

IV.

And replying to Paragraph IX thereof, plaintiffs admit that said answering defendant, Carl Rudeen, has received certificates of purchase for said real and personal property, but specifically deny that the said Carl Rudeen is the owner of said property, and specifically deny that the said Carl Rudeen is entitled to the possession and allege that any possession that the said Carl Rudeen has of said property would be that of the Great West Lumber Corporation.

V.

Replying to Paragraph X, plaintiffs admit that on the 4th day of August, 1948, R. O. Camozzi was the general manager and president of the Great West Lumber Corporation and admit that he, the said R. O. Camozzi, attempted to execute and deliver to plaintiffs on behalf of the Great West Lumber Corporation a promissory note and mortgage, being those referred to in plaintiffs' complaint for the purpose of securing plaintiffs upon a pre-existing indebtedness then owing to the Great West Lumber Corporation to plaintiffs, and deny that the said R. O. Camozzi had no authority actual or apparent to make, execute and delivery any such instruments on behalf of Great West Lumber Corporation and deny that the same were or are not the said acts of said corporation, and deny that the same are not binding upon said corporation and further replying to said Paragraph X, plaintiffs allege that the said Great West Lumber Corporation, its Board of Directors, officers, agents and employees, ever since the formation of said corporation placed the said

R. O. Camozzi in complete and unlimited charge, permitting the said R. O. Camozzi to do and transact any and all business of said corporation over a long period of time at and prior to August 4, 1948, and that the said Board of Directors, officers, agents and employees of said corporation held out to the general public and to these plaintiffs that the said R. O. Camozzi was vested with full and complete authority to do and transact any and all business of said corporation, including the business of executing and delivering promissory notes and mortgages and that in truth and in fact over a long period of time the said R. O. Camozzi had dealt in real estate, purchased and sold timber, incurred indebtedness, bought and installed the plant of the defendant corporation, compromised debts and made all manner of contracts, and the said company held out to the public, including these plaintiffs, and represented to them that the said R. O. Camozzi was fully authorized to do and perform the acts alleged in these plaintiffs' complaint and all of them and that the said corporation and the answering defendant, Carl Rudeen, one of the corporation's Board of Directors, had so held out to these plaintiffs and the public in general such facts, accepted the benefits of said note and mortgage, and are now estopped from and in no proper position to deny the authority of R. O. Camozzi to execute and deliver said instrument.

XI.

Replying to Paragraph XI thereof, plaintiffs admit that plaintiffs assert that said mortgage, Exhibit

“A” to plaintiffs’ complaint, is a valid mortgage upon said real and personal property and admit that plaintiffs assert that it is prior in time to answering defendant’s interest, if any, acquired upon said tax sale and admit that plaintiffs’ claim constitutes a cloud upon answering defendant’s title and ownership, if any, to said real and personal property, but deny that said cloud should be removed by decree declaring said mortgage to be wholly void and of no effect, or in any wise.

Wherefore, plaintiffs, having fully replied to defendant’s third defense and cross-claim, pray that answering defendant Carl Rudeen take nothing thereby and that these plaintiffs have and take decree as in their complaint prayed.

/s/ U. S. BALENTINE,

/s/ HICKS, DAVIS & TONGUE,

Attorneys for Plaintiffs.

Acknowledgment of Service attached.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This case having come on regularly for pre-trial conference at Klamath Falls, Oregon, before the Honorable James Alger Fee, United States District Judge, on June 8, 1949. Plaintiffs appearing in person and by and through U. S. Balentine and Hicks, Davis, and Tongue, their attorneys. Defendant, Carl Rudeen, appearing in person and by Robert A.

Leedy of his attorneys, and Defendant, Great West Lumber Corporation appearing not and it having been stipulated that, if necessary, further proceedings may be had against said Defendant or that additional parties be brought in. The following proceedings were then and there had, to-wit:

Admitted Facts

1. That at all times involved herein plaintiffs were and now are residents of Oregon doing a general hauling and trucking business in the State of Oregon as co-partners, under the assumed name and style of Lilly and Valentine Trucking Company.

2. That at all times, until December 1, 1947, defendant Great West Lumber Corporation was a corporation organized and existing under and by virtue of the laws of the State of Idaho; that if the legal existence of said corporation was then terminated, it continued to exist as a defacto corporation during all times involved herein; that it was and now is qualified to do business in the State of Oregon as a foreign corporation and has a duly appointed attorney in fact in such state.

3. That Defendant, Great West Lumber Corporation was organized as an Idaho corporation about November 1, 1946, for the purpose of engaging in the business of manufacturing and selling lumber as expressed in its Articles of Incorporation which are designated herein as Defendant Rudeen's pre-trial Exhibit 23.

4. That the Great West Lumber Corporation en-

gaged in the operation of a sawmill in Klamath County, Oregon, as its sole operation and source of income.

5. That Defendant Great West Lumber Corporation duly adopted certain by-laws as set forth in the document designated herein as defendant Rudeen's pre-trial Exhibit 24.

6. That the stockholders and directors of Great West Lumber Corporation held certain meetings as set forth in the Minutes designated herein as Plaintiff's Exhibit 1.

7. That Great West Lumber Corporation possessed a duly adopted corporate seal, which was in the custody of its attorney at his office in the State of Idaho.

8. That during all times mentioned herein, R. O. Camozzi was the president and general manager of Great West Lumber Corporation and superintended its lumber manufacturing and selling operations.

9. That at the times mentioned, Harry W. Barry was the duly elected and acting Secretary-Treasurer of said Great West Lumber Corporation and was also a director of said corporation and as secretary of said corporation joined in the execution of some, but not all instruments executed on behalf of said corporation.

10. That at all times involved herein defendant Carl Rudeen was and is now a resident of the State of Idaho. On June 25, 1949, he became a director of Great West Lumber Corporation and now is a director of said corporation.

11. That R. O. Camozzi was the only officer or director of said corporation stationed or residing at or near its sawmill or otherwise regularly present in the State of Oregon and that all other officers and directors resided outside the State of Oregon and did not directly conduct or participate in any business transactions with any third party on behalf of Great West Lumber Corporation in Oregon.

12. That until November 15, 1948, the directors of Great West Lumber Corporation vested in R. O. Camozzi broad powers in the management of the business of said corporation and authorized him to manage the affairs of the corporation in the State of Oregon in the ordinary course of its business.

In the course of such management he had, prior to August 4, 1948, on behalf of said corporation, borrowed money from Fleishman Lumber Company, had entered into a contract with Fleishman Lumber Company to sell the entire output of the sawmill of said corporation to said concern, had directed the application of the proceeds of lumber sales to creditors of the corporation, had directed the expansion of the corporation's sawmill, had contracted for and purchased all of the sawmill equipment acquired by said corporation subsequent to its purchasing the sawmill as well as timber and real property for said corporation, had directed the operations of said sawmill and the sale of the lumber and lumber products produced by said sawmill, all with the authority of the Board of Directors of Great West Lumber Corporation.

13. That except as indicated in the Minutes desig-

nated herein as Plaintiffs' Exhibit 1 the Board of Directors of Great West Lumber Corporation held no meetings and transacted no other business, and except as indicated therein and in the By-Laws designated as Defendant's Exhibit 24, said directors exercised no direction or supervision over the activities of R. O. Camozzi as the president and general manager of said corporation, and except as indicated, therein, imposed no express limitations upon his activities in that capacity and required no other or different formal reports of such activities to the Board of Directors as such. However, some individual members of said Board of Directors did on occasion informally discuss corporate affairs with R. O. Camozzi.

13a. That certain audits were prepared of the affairs of Great West Lumber Corporation under dates of September 11, 1947 and November 20, 1948, designated herein as Plaintiffs' Pre-Trial Exhibits 2 and 3 and a certain output contract was executed by R. O. Camozzi for and on behalf of Great West with Fleishman Lumber Company designated hereing as Plaintiffs' Pre-Trial Exhibit 4.

14. That Plaintiffs were engaged by R. O. Camozzi on behalf of Great West Lumber Corp. to haul lumber from said sawmill and that as a result of said engagement, Great West Lumber Corporation became and was on July 31, 1948, indebted to Plaintiffs in the amount of \$15,134.97.

15. That on July 31, 1948, Plaintiffs filed a complaint in an action at law against Great West Lumber Corp. for the sum of \$15,134.97, plus \$1,000 in

attorneys fees, in the Circuit Court of the State of Oregon for Klamath Falls, a copy of which is referred to herein as Plaintiffs' Pre-Trial Exhibit 5. As the result of said complaint on July 31, 1948, an attachment was issued, a copy of which is included in Plaintiffs' Pre-Trial Exhibit 5. On July 31, 1948, plaintiffs also filed a complaint in a suit in equity in the same court as aforesaid, a copy of which is referred to herein as Plaintiffs' Pre-Trial Exhibit 6. As a result thereof, on July 31, 1948 a preliminary injunction was issued, a copy of which is included in Plaintiffs' Pre-Trial Exhibit 6.

16. That on or about August 4, 1948, R. O. Camozzi agreed with Plaintiffs and on behalf of Great West Lumber Corporation that the amount sued for by and under said cases should be settled in the amount of \$16,000; that cash or a promissory note should be executed in the amount of \$6,000 and a mortgage in the amount of \$10,000 upon the sawmill of Great Western Lumber Corporation.

17. That at said time there was of record a chattel mortgage given by B & C Lumber Company, to Fleishman Lumber Company covering the original sawmill which was acquired by Great West Lumber Corporation at the time of its incorporation; that the original mortgage indebtedness thereon had been paid but the mortgage had never been satisfied of record; that at Plaintiffs insistence said mortgage was satisfied of record at the time of execution of said new purported mortgage to Plaintiffs. Said mortgage and satisfaction are referred to herein as Plaintiffs' Pre-Trial Exhibits Nos. 5, 7 and 8.

18. That on or about August 4, 1948, R. O. Camozzi executed a certain Promissory Note on behalf of Great West Lumber Corporation, payable to Plaintiff in the sum of \$6,000 of which said note was endorsed for accommodation by James Fleishman, head of Fleishman Lumber Company and said note was later paid.

19. On August 4, 1948, for good and valuable consideration and for the purpose of inducing Plaintiffs to dismiss the aforesaid law action and suit in equity, R. O. Camozzi, who then and at all times involved herein was general manager and president of Defendant Great West Lumber Corporation, executed and delivered to Plaintiffs, purportedly on behalf of said corporation, a certain promissory note in the amount of \$10,000 designated herein as Plaintiffs' Pre-Trial Exhibit 9, and, as security therefor, a certain purported mortgage designated herein as Plaintiffs' Pre-Trial Exhibit 10, both for the purpose of securing Plaintiffs upon the pre-existing indebtedness aforesaid; that, acting upon the inducement of the aforesaid note and mortgage and in reliance thereon, Plaintiffs dismissed the aforesaid law action and suit in equity, together with said attachment and said preliminary injunction and said corporation was enabled to resume operations and to resume its sale of lumber and lumber products.

20. That on January 27, 1949 and since prior to August 4, 1948 Defendant, Great West Lumber Corporation was the owner of record of the following described real property in Klamath County, Oregon:

The NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 13, Township 23s., Range 9 East of the WM;

that on January 27, 1949, there was on the above described real property a complete sawmill, together with the items set forth in the notice of levy referred to herein or Defendant, Carl Rudeen's Pre-Trial Exhibit 25. That the same personal property described above was also on the above described premises on August 4, 1948, and owned by said defendant on said date, except that one of the above described motors was acquired since that date and has since been released to the seller thereof.

21. That the Board of Directors of Great West Lumber Corporation gave no express and specific authority to R. O. Camozzi to execute on behalf of the corporation the particular note and mortgage, Plaintiffs' Pre-Trial Exhibits 9 and 10.

22. That the officers and directors of Great West Lumber Corporation other than R. O. Camozzi, had no knowledge of the execution and delivery of the purported note and mortgage, Plaintiffs' Pre-Trial Exhibits 9 and 10 until on or about November 17, 1948, but that said mortgage was placed on record in Klamath County, Oregon, on or about August 6, 1948.

23. That subsequent thereto plaintiffs resumed hauling lumber for Great West Lumber Corporation and as a result thereof on October 15, 1948, said Great West Lumber Corporation owed plaintiffs a sum, the amount of which is in dispute, in addition to the sums represented by the notes and mortgage aforesaid.

24. That on October 15, 1948, plaintiffs filed a complaint in a further action at law against Great West Lumber Corporation in the aforesaid Circuit Court in the amount of \$9,013.50 together with a Notice of Attachment and affidavit, copies of which are referred to herein as Plaintiffs' Exhibit 11. As a result thereof an attachment was issued and served upon the American Lumber & Box Company of Lakeview, Oregon. A copy of said attachment is included in Plaintiffs' Pre-Trial Exhibit 11. That the sum of \$4,000 was paid to plaintiffs as a result of the aforesaid attachment.

25. By letters dated October 3 and 10, 1948, said R. O. Camozzi on behalf of Great West Lumber Corporation gave instructions to Fleishman Lumber Company to pay to plaintiffs a certain specified portion of each payment due from Fleishman Lumber Company to Great West Lumber Corporation. Said letter referred to herein as Plaintiffs' Pre-Trial Exhibit 12 a and b.

26. That between October 11, 1948 and November 13, 1948, Fleishman Lumber Company paid to plaintiffs, in accordance with the foregoing instructions, the sum of \$6,218.87, as indicated by a statement of account, a copy of which is referred to herein as Plaintiffs' Pre-Trial Exhibit 13. That on November 1, 1948 plaintiffs instructed Fleishman Lumber Company to cease further deductions from payments due to Great West Lumber Corporation by letter referred to herein as Plaintiffs' Pre-Trial Exhibit 14.

27. That no instructions were given by or on behalf of Great West Lumber Corporation to plain-

tiffs as to the manner of application of said payments.

28. That the record of dates and amounts of payments as claimed by plaintiffs is referred to Pre-Trial 15, that such records as plaintiffs have, showing the work performed for Great West Lumber Corporation on which said debt arose and to which said payments were applied are referred to herein as Plaintiffs' Pre-Trial Exhibits 16 and 17.

29. That prior to August 4, 1948, defendant Great West Lumber Corporation incurred liability to the U. S. for internal revenue taxes and there were filed with the County Clerk of Deschutes County, Oregon, notices of liens for said unpaid taxes as referred to herein in Defendant Rudeen's Pre-Trial Exhibit 26. That when said liens were filed in Deschutes County it was assumed by the United States Bureau of Internal that said sawmill was in that county, when in truth and in fact said sawmill was then located in Klamath County, Oregon.

30. That none of the above described personal property was ever in said sawmill upon the above described real property was ever physically present or at rest in Deschutes County, Oregon, in the ownership of said corporation at or after the filing of said notices of tax liens, with the possible exception of the following items as to which a controversy exists and an issue of fact has arisen, as hereinafter stated:

One double head-rig

One trim saw

One edger.

31. That on November 4, 1948, and November 20, 1948, notices of tax liens for U. S. Internal Revenue taxes due from defendant Great West Lumber Corporation were filed with the County Clerk of Klamath County, Ore., in the following amounts:

11/ 4/48—\$1,892.04

11/ 4/48— 3,922.71

11/ 4/48— 495.96

11/20/48— 4,717.15

32. Under the management of R. O. Camozzi the operations of Great West Lumber Corporation were conducted at a substantial loss. Said directors at all times until on or about November 15, 1948, believed said corporation to be solvent and its affairs to be progressing in a satisfactory manner. In fact, said corporation became insolvent by November 15, 1948, which condition of insolvency was known or should have been known to Camozzi prior to November 15, 1948, but was unknown to the other officers and directors until about that date.

33. On November 15, 1948, the directors of Great West Lumber Corporation held a meeting and adopted a resolution limiting the previous broad powers of R. O. Camozzi and appointing an Executive Committee to supervise operations, all as set forth in Plaintiffs' Exhibit 1. At the same meeting an audit was directed and was submitted under date of November 20, 1948. A copy thereof is referred to hereinabove as Plaintiffs' Pre-Trial Exhibit 2. A previous audit under date of September

11, 1947 is also referred to hereinabove as Plaintiffs' Exhibit 3.

34. That on or about December 9, 1948, the Collector of Internal Revenue for the District of Oregon, pursuant to warrants for distraint for unpaid internal revenue taxes of the Great West Lumber Corporation, levied upon all of the personal property of said corporation, including all of the personal property described in the purported mortgage, Plaintiffs' Pre-Trial Exhibit 10. A copy of said notice of levy is referred to herein as Defendants' Pre-Trial Exhibit 25.

35. That thereafter, and prior to January 27, 1949, said Collector of Internal Revenue levied upon the real property of Great West Lumber Corporation described in said purported mortgage, Plaintiffs' Pre-Trial Exhibit 10.

36. That on December 20 and 26, 1948, meetings of stockholders and directors of Great West Lumber Corporation were held for the purpose of transacting the matters set forth in Plaintiffs' Exhibit 1.

37. That on January 27, 1949, the Collector of Internal Revenue for the District of Oregon sold at public auction all of the right, title and interest of Great West Lumber Corporation in and to the personal property theretofore levied upon, including that described in said purported mortgage, Plaintiffs' Pre-Trial Exhibit 10, and all of said corporation's right, title and interest in and to the real property described in said mortgage. That Defendant, Carl Rudeen was the successful bidder for said real and personal property for the sum of \$8,000 and

said defendant has been issued and now holds certificates of sale covering said real and personal property referred to herein as Defendants' Pre-Trial Exhibits 27 and 28. That said certificates of sale purport to allocate the sum of \$7,999.00 toward the purchase of personal property and the sum of \$1.00 upon the purchase of real property. That the bid of defendant Carl Rudeen was not allocated and such allocation was made by said Collector of Internal Revenue without the authority or acquiescence of Defendant, Carl Rudeen.

38. That at the time of said tax sale the representatives of the government stated that plaintiffs held a mortgage on said property, but that there is a dispute as to what else occurred at said sale and as to the understanding of the parties at said sale.

39. After November 15, 1948, Defendant Carl Rudeen engaged in activities in connection with Great West Lumber Corporation, the nature, extent, and effect of which are in dispute. Letters written by him and telegrams exchanged are material in connection therewith and are referred to herein as Defendant Rudeen's Pre-Trial Exhibit 29, a to f.

40. An executive committee of the Board of Directors of Great West Lumber Corporation was furnished certain purported financial statements, the accuracy of which is not admitted. These statements are referred to as Defendant Rudeen's Pre-Trial Exhibit 30, a and g.

41. That it has been stipulated by and between plaintiffs and defendants Rudeen and Klamath County, Oregon, that no real property taxes are now

due and owing upon the above described real property, but that there have been assessed, and levied personal property taxes upon the above designated personal property in the sum of \$2,860.19 which have not been paid as indicated by stipulation designated as Plaintiffs' Pre-Trial Exhibit 18.

Plaintiffs' Contentions

A. On Question of Authority to Execute Mortgage

1. That under the By-Laws and the custom and practice thereunder actual authority was delegated to Camozzi to execute real estate mortgages under the circumstances of this case.

2. That Camozzi also had apparent or ostensible authority to execute such a mortgage and the corporation and its officers and directors are estopped to deny such authority.

3. That by accepting the benefits of the mortgage the corporation and its officers and directors are barred from denying such authority.

4. That defendant Rudeen is not in a proper position to raise the question of lack of authority to execute the mortgage.

5. That defendant Rudeen by his individual conduct is estopped from denying such authority.

In support of the foregoing contentions and in addition to the admitted facts above stated Plaintiffs will offer oral testimony together with the docu-

ments designated as Plaintiffs' Pre-Trial Exhibits 19, 20, 21 and 22.

B. On the Question whether the Tax Sale
Extinguish the Mortgage

1. That the tax liens were inferior to the mortgage because not filed in Klamath County until after the mortgage was filed.

2. That the tax sale was intended to be subject to said mortgage.

3. That defendant Rudeen is estopped by his official capacity and by his individual conduct from denying that said tax sale was subject to said mortgage.

In support of the foregoing contentions and in addition to the admitted facts above stated plaintiffs will offer oral testimony together with the documents referred to as Plaintiffs' Pre-Trial Exhibits 19, 20 and 21.

C. On Plaintiffs Request to Reform the
Mortgage

1. That the parties to the mortgage intended that it apply to all personal property and equipment on or at the site of the sawmill.

2. That the general language of the mortgage is reasonably subject to such interpretation and should thus be so construed.

3. That otherwise said mortgage should be reformed to reach such a result.

E. On Plaintiffs Request to Adjudicate
County Tax Liens

Based on stipulation of the parties, plaintiffs submit that the county tax liens should be adjudicated in the amount of \$2,860.19.

F. On Plaintiffs Request for a Receiver

That under the circumstances of this case a receiver should be appointed pending its final determination.

Defendant Rudeen's Contentions

1. That the purported mortgage to plaintiffs, Plaintiffs' Pre-Trial Exhibit 10, was executed by R. O. Camozzi without any authority of Great West Lumber Corporation, actual or ostensible, so to do, so that the same was not and is not a valid subsisting lien on the property therein described.

2. That defendant Rudeen is entitled to assert the invalidity of said mortgage.

3. That said mortgage is ineffective as to personal property not specifically described therein.

4. That defendant Rudeen is the legal and beneficial owner of the certificates of tax sale, Defendant Rudeen's Pre-Trial Exhibits 27 and 28, and of the property therein described subject to any existing right of redemption.

5. That plaintiffs are not entitled to a reformation of the mortgage, Plaintiffs' Pre-Trial Exhibit 10.

6. That no basis exists for the appointment of a receiver.

7. That defendant Rudeen is entitled to a decree declaring him to be the owner of the real and personal property free from any claims by plaintiffs.

In support of these contentions, defendant Rudeen will rely upon the admitted facts, upon all of the Exhibits herein referred to, and upon oral testimony to be offered upon the trial.

Issues

1. Whether R. O. Camozzi had authority, either actual or apparent, to execute the mortgage on behalf of Great West Lumber Corporation.

2. Whether Defendant Rudeen is entitled to assert that said mortgage was executed without authority.

3. Whether as to Defendant Rudeen, the mortgage is valid as to personal property not specifically described therein.

4. Whether the mortgage should be interpreted or reformed so as to include items of personal property not specifically mentioned and if so, what terms.

5. Whether Defendant Rudeen is entitled to assert priority of the interest acquired at the tax sale over the lien, if any, of the mortgage.

6. Whether the county tax liens of Klamath County should be adjudicated, and, if so, in what amount.

7. Whether a receiver should be appointed.

8. Whether a decree of foreclosure should be en-

tered in favor of plaintiffs, and, if so, what amount of attorney's fees should be included.

9. Whether a decree should be entered in favor of Defendant Rudeen declaring him to be the owner of the real and personal property free from any claim by plaintiffs.

Exhibits

The following exhibits were marked at the time of said pre-trial conference and it was stipulated and agreed that all of said exhibits may be offered in evidence by either party for what they may be worth.

Plaintiffs' Exhibits

1. Minutes of meetings of directors and stockholders.
2. Audit dated 9/11/47.
3. Audit dated 11/20/48.
4. Contract dated 10/3/47.
5. Record in Case No. 5948.
6. Record in Case No. 9060.
7. Mortgage to B. & C. Lumber Company.
8. Satisfaction of Said Mortgage.
9. Promissory Note.
10. Mortgage to Plaintiffs.
11. Record 5980L.
12. Letters from Camozzi to Fleishman Lumber Company.
13. Statement by Fleishman Lbr. Co.
14. Letter from Balentine to Fleishman Lumber Company.

15. Record of Payments to Plaintiffs.
16. Accounting Records of Plaintiff of Work Performed.
17. Accounting Records of Plaintiff of Work Performed.
18. Stipulation re County Tax Liens.
19. Deposition of Harry Barry.
20. Deposition of Defendant Rudeen.
21. Answer and Cross Claim of Defendant Rudeen.
22. Contract between Great West Lumber Corporation and Long.

Defendant's Exhibits

23. Articles of Incorporation.
24. By-Laws.
25. Notice of Tax Levies in Klamath County.
26. Summary of Notices of Tax Levies in Deschutes County.
27. Certificate of Sale of Real Property.
28. Certificate of Sale of Personal Property.
29. Letters and Telegrams written by Defendant Rudeen.
30. Financial Statements and Lists of Creditors.

The foregoing pre-trial sets forth the admitted facts, the contentions of the parties, the issues and

the exhibits. It entirely supersedes the pleadings which now pass out of the case. This order may not be amended except by consent or to prevent manifest injustice.

Dated and entered this the 8th day of June, A.D., 1949.

/s/ JAMES ALGER FEE,
United States District Judge.

Approved:

/s/ THOMAS H. TONGUE, III.,
Attorneys for Plaintiffs.

/s/ ROBERT A. LEEDY,
of Attorneys for Defendant,
Rudeen.

[Endorsed]: Filed June 8, 1949.

[Title of District Court and Cause.]

AMENDMENT TO PRE-TRIAL ORDER

This matter having come on regularly for trial before the Honorable James Alger Fee, United States District Judge, on June 8, 1949, and a pre-trial order having been entered, and it now appearing that certain issues of fact are referred to in the recital of admitted facts in said pre-trial order when in fact no such issues exist; and

It Further Appearing that said pre-trial order should be amended by consent in order to dispose of said apparent issues. Accordingly, there are agreed upon the following:

Additional Admitted Facts

1. Notwithstanding the recitals of Paragraph 23 of the admitted facts in said pre-trial order, no dispute or issue of fact exists with reference to the amount of the obligation incurred by Great West Lumber Corporation to the Plaintiffs and owing on October 15, 1948.

2. Notwithstanding the recitals contained in Paragraph 30 of the admitted facts in the pre-trial order herein, it is agreed that none of the personal property involved was ever physically present or at rest in Deschutes County, Oregon, in the ownership of Great West Lumber Corporation at or after the filing of notices of tax liens in Deschutes County, Oregon, and no controversy or issue of fact exists with reference thereto.

3. Notwithstanding the general references to the

question of payment of the obligation claimed by Plaintiffs to be secured by the mortgage, Plaintiffs' Exhibit 10, there is no dispute with reference thereto, and it is admitted that said indebtedness is unpaid and that the balance thereunder is the sum of \$9546.63.

Dated and Entered this 11th day of July, 1949.

/s/ JAMES ALGER FEE,
United States District Judge.

Approved:

/s/ THOMAS H. TONGUE, III.,
of Attorneys for Plaintiffs.

/s/ ROBERT A. LEEDY,
of Attorneys for Defendant
Rudeen.

[Endorsed]: Filed July 11, 1949.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause having come on regularly for trial on June 8, 1949, before the Court, sitting in Klamath Falls, Oregon, without a jury, plaintiffs appearing by and through U. S. Balentine and Thomas H. Tongue, III, their attorneys, defendants Great West Lumber Corporation and Klamath County, Oregon, appearing not, and defendant Carl

Rudeen appearing by and through Robert A. Leedy, his attorney, and the Court having heard the testimony and having examined the evidence offered by both parties and the cause having been submitted to the Court for decision and the Court, having considered written memoranda and oral arguments submitted by both parties and being advised in the premises, now makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

That defendant Great West Lumber Corporation, an Idaho corporation, was organized on or about November 1, 1946, for the purpose of operating a saw mill in Klamath County, Oregon; that the President and General Manager of said corporation and its sole and only officer present in the State of Oregon during the times involved herein was one R. O. Camozzi; that the stockholders and directors thereof became inactive and failed to hold regular meetings or to take an active part in the affairs of said corporation or to supervise the activities of said President and General Manager, and acquiesced in all of his acts, and under the by-laws of said corporation and the custom and practice thereunder, said stockholders and directors conferred and delegated both actual and apparent authority upon its said President and General Manager to take charge of, operate, manage and control all of the affairs of the corporation in Oregon, including the operation of its

saw mill in Klamath County, and also including all things which he considered to be necessary or proper in connection therewith; that such actual and apparent authority included power to execute a certain mortgage dated August 4, 1948, to plaintiffs to secure a promissory note payable to plaintiffs under the same date, in the sum of \$10,000., of which the sum of \$9,546.63 is still due and owing on the principal thereof and that said mortgage was duly recorded in Klamath County on August 5, 1948.

II.

That at and prior to the time of the execution of said note and mortgage plaintiffs had filed suit against said corporation to recover the sum of \$15,134.97 and had secured an attachment against the lumber produced by the saw mill of said corporation and awaiting sale, and a preliminary injunction restraining all sales of lumber by said corporation; that as a result thereof the saw mill of said corporation was forced to cease operations and only resumed operations when the mortgage was executed and the attachment released and the injunction dismissed; that plaintiffs declined to release said attachment or to dismiss said injunction, unless provided with security for said obligation by way of a mortgage; that to call a meeting of the directors of said corporation at its home office in Idaho to consider said matter would have required a delay of several days; that it was not practicable to call such a meeting under the circumstances; that the President and General Manager of said corporation had

substantial reason to believe that such an emergency existed as to seriously threaten the affairs of said corporation, unless said mortgage was executed immediately and without such delay; that the execution of said mortgage was reasonably necessary to prevent substantial loss and that the execution thereof enabled said corporation to secure a release of said attachment and a dismissal of said injunction, to resume sales of lumber and to escape the danger of closing its saw mill operations and was of substantial benefit to said corporation and to its directors and stockholders.

III.

That at the time of the execution of said mortgage and immediately thereafter the directors of said corporation had reason to know of all of the facts relating thereto and an opportunity to inform themselves as to all of said facts; that thereafter and not later than November 17, 1948, the directors of said corporation at a special meeting of said directors considered the matter of the execution of said note and mortgage and neither at that time nor at any time thereafter took any action whatever to rescind or reject said mortgage or to deny that said mortgage was a duly authorized, valid and existing obligation of said corporation and the execution of said mortgage has been ratified by the directors of said corporation.

IV.

That said corporation was duly served with a copy of the complaint and summons herein and has failed

to deny any of the allegations of said complaint or to contest the entry of a decree as prayed for therein and is now in default.

V.

That defendant Rudeen was at the time of the execution of said note and mortgage and at all times thereafter a stockholder and director of said corporation; that following the execution of said mortgage and the notice thereof to the directors of said corporation, as aforesaid, defendant Rudeen undertook an attempt to reorganize the affairs of said corporation, to salvage the assets thereof and to bid upon the assets of said corporation at a sale conducted on January 27, 1949, by the Collector of Internal Revenue pursuant to warrants of distraint for unpaid federal Internal Revenue taxes levied upon the real and personal property of said corporation in Klamath County, Oregon; including the property described in the aforesaid mortgage; but that notices of tax liens for said unpaid taxes were not filed in Klamath County, Oregon, until after the recording of said mortgage.

VI.

That at said tax sale on January 27, 1949, defendant Rudeen submitted a bid of \$8,000, for the real and personal property of said corporation subject to said tax liens, which said property was originally purchased and constructed by said corporation at a cost in excess of \$200,000. and was the successful bidder at said tax sale; that prior to said tax sale

defendant had full and complete knowledge of all of the facts relating to the execution of said mortgage and with said knowledge mailed a letter dated January 6, 1949, to plaintiffs, recognizing the existence and validity of said mortgage, stating that the corporation had no funds to pay it and that the aforesaid tax sale would be subject to said mortgage; that at the time of said sale and thereafter defendant further recognized the existence and validity of said mortgage and that said sale was subject thereto; that plaintiffs had reason to and did rely upon the aforesaid conduct and representations of defendant Rudeen and that said defendant Rudeen was not an innocent or bona fide purchaser and that said defendant Rudeen is estopped thereby to deny the validity of said mortgage and that said tax sale was subject to said mortgage.

VII.

That the aforesaid mortgage was intended to and did cover the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of Sec. 13, T. 23 S., Range 9, E. of the W.M., together with a complete saw mill situate thereon, which said real property is described and covered by said mortgage and that said mortgage covers the following items of saw mill equipment:

Hercules 3 KW Generators; 1 Koehler $1\frac{1}{2}$ KW Generator;

U. S. Army Sig. Corps $1\frac{1}{2}$ KW Gen. Motor No. 63655 Model 1 M 21-A;

140 H.P. Hercules Motor, Model ZXB Motor No. 315987-3 DW;

1 Model HXE 6 Cyl. Motor Stand and Transmission No. 327206;

120 H.P. Red Seal R-6-02-1040 Gas Motor with twin disc clutch;

35 H.P. Red Seal F226 Clutch C-103124, Spec. No. 18557, P.A. 244-302;

Hercules Motor 95 H.P. Model RXLD 137290 (6 Cyl.);

Convey Motor, 35 H.P. Red Seal F 266;

Red Seal 55 H.P. M 290-425 Twin Disc Clutch for log haul;

Log Haul Chain and equipment;

Green chain motor;

Log Haul chain and equipment;

Chrysler Industrial 8 Cyl. Motor C-36, Ind. -9-99 Serial No. 7990—Automotive Clutch;

Continental Red Seal No. F 162-29341 and Clutch;

Air Cool Wisconsin 22 H.P. Model V.E. 4 Serial No. 869394 Specification No. 36756;

Wisco 6 H.P. Motor, Air cool;

2—350 Gal. water pumps, 1 stationary, 1 portable;

45 H.P. Gas Motor Jammer for Log Haul;

Small Head Rig and Carriage;

Big Head Rig and Carriage;

Edger;

Trim Saw;

Waste Conveyor;

2 Lath Machines;

Green chain; capacity 80,000 ft.;

2 Boilers, Straw Burners;

Steam Rigger;

1 Double Head;

1 Single Head;

Saws and Filing Equipment;

Aluminum covered mill building, approx. 60x120 feet;

120 H.P. Red Seal R-6-02-3602 Gas Motor with twin disc clutch.

VIII.

That it has been stipulated by and between plaintiffs and defendant Rudeen and Klamath County, Oregon, that no real property taxes are due and owing upon the above described real property, but that there has been assessed and levied personal property tax in the sum of \$3,369.32 which have not been paid.

IX.

That a reasonable sum to be allowed as attorneys' fees to attorneys for plaintiffs in view of the nature of this cause, the amount of money and property involved, the nature of the legal issues, the time involved in the investigation of the case, preparation of pleadings, taking of depositions, pre-trial, preparation for trial, trial, the preparation of memorandum briefs and for oral argument and in the preparation of proposed findings of fact and conclusions of law, and in consideration of the testimony submitted as to the reasonable value of said services is the sum of \$1,250.00.

CONCLUSIONS OF LAW

I.

That there was both actual and apparent authority for the execution by the President and General Manager of defendant Great West Lumber Corporation of the mortgage on behalf of said corporation, dated August 4, 1948, in favor of plaintiffs herein.

II.

That the stockholders and directors of said corporation subsequently ratified the execution of said mortgage and are estopped from denying the validity thereof.

III.

That an order of default herein should be entered against defendant Great West Lumber Corporation.

IV.

That defendant Rudeen has not established that his alleged purchase of the property involved herein at the tax sale of January 27, 1949, was a bona fide transaction or by an innocent purchaser, or for an adequate consideration, and that defendant Rudeen was not an innocent or bona fide purchaser and is likewise estopped from and not in a position to deny the validity of said mortgage.

V.

That said mortgage is a valid and subsisting lien upon the properties described herein and is prior in time and superior to any claim of defendant Rudeen or of or on behalf of said corporation.

VI.

That plaintiffs are entitled to have said mortgage foreclosed and the property hereinabove described sold in the manner prescribed by law, and the proceeds from such sale applied to the payment of monies due as aforesaid; that is to say, that plaintiffs recover the sum of \$9,546.63 and also the sum of \$1,250.00 for attorneys' fees, together with plaintiffs' costs herein, with interest at the rate of six per cent per annum until paid, and the charges of said sale.

VII.

That said property be sold according to law by an official to be appointed by this Court, and the proceeds applied to the payment of the amount due on said promissory note and mortgage, with interest, disbursements and attorneys' fees; that plaintiffs and any other parties to this action may become a purchaser at the sale of said property; and that the property ordered to be sold as aforesaid is as described in Paragraph VII of the Findings of Fact herein.

VIII.

That personal property taxes in the amount of \$3,369.32 are due and owing on said property to Klamath County, Oregon.

Dated this 19th day of February, 1950.

/s/ JAMES ALGER FEE,

United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed February 19, 1951.

In the United States District Court for the
District of Oregon

Civil No. 4401

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,

Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a corporation, and CARL RUDEEN, and KLAMATH COUNTY, OREGON, a municipal corporation,

Defendants.

DECREE OF FORECLOSURE AND ORDER
OF SALE

The above entitled cause having come on regularly for trial on June 8, 1949, before the Court sitting in Klamath Falls, Oregon, without a jury, plaintiffs appearing by and through U. S. Balentine and Thomas H. Tongue, III, their attorneys, defendant Klamath County, Oregon, appearing not, and defendant Great West Lumber Corporation appearing not, and an order of default having been entered against said defendant, and defendant Carl Rudeen appearing by and through Robert A. Leedy, his attorney, and the Court having heard the testimony and having examined the evidence offered by both parties, and the cause having been submitted to the

Court for decision and the Court, having considered written memoranda and oral arguments submitted by both parties and having made and caused to be filed herein its Findings of Fact and Conclusions of Law; Now, Therefore;

It Is Ordered, Adjudged and Decreed as follows:

(1) That plaintiffs have judgment against defendant Great West Lumber Corporation in the sum of \$9,546.63, with interest thereon at the rate of 6 per cent per annum from August 4, 1948, until paid, together with attorneys' fees in the sum of \$1,250.00, and such costs and disbursements as may be taxed, with interest at 6 per cent per annum from the date hereof until payment thereof.

(2) That the mortgage dated August 4, 1948, under which plaintiffs were named as mortgagees and defendant Great West Lumber Corporation was named as mortgagor, shall be foreclosed as provided by law and as hereinafter directed.

(3) That pursuant to said foreclosure the property hereinafter described shall be sold at public auction according to law and that plaintiffs or any of the parties to this suit may purchase at said sale;

(4) That said sale shall be made at public auction, for cash, by the United States Marshal hereinafter designated; that out of the proceeds of said sale said Marshal retain his fees and disbursements on said sale, pay to Klamath County, Oregon, for taxes the sum of \$3,369.32, pay to the plaintiffs or their attorneys out of said proceeds such costs and disbursements as may be allowed herein, and the sum

of One Thousand Two Hundred-Fifty Dollars (\$1,250.00) allowed by this Court as attorneys' fees, with interest thereon at the rate of six per cent per annum from the date hereof until paid, and the sum of \$9,546.63, with interest thereon at the rate of six per cent per annum from August 4, 1948 until paid, or so much thereof as said sale proceeds permit; and that said Marshal take and return to this Court receipts for the amounts so paid, to be presented to this Court, together with his return and report of sale, and any surplus monies which may remain after applying the proceeds of sale as aforesaid within ten (10) days after making said sale; said surplus, if any there be, to abide the further order of this Court.

(5) That the defendants and all persons claiming from and under them be and they are hereby forever barred and foreclosed of and from all equity of redemption and a claim in or to said property, and all parts thereof, except such right of redemption as they may have by law from said sale, and Jack R. Caufield, United States Marshal, is hereby appointed to conduct said sale, the fees prescribed by statute being hereby fixed and allowed said United States Marshal as and for reasonable compensation for his services in that behalf.

(6) The property hereinabove referred to consists of the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of Sec. 13, Township 23 S., Range 9, E. of the W.M., together with a complete saw mill situate thereon and including the following items of saw mill equipment:

Hercules 3 KW Generators; 1 Koehler 1½ KW Generator;

U. S. Army Sign. Corps 1½ KW Gen. Motor No. 63655 Model 1 M 21-A;

140 HP Hercules Motor, Model ZXB Motor No. 315987-3 KW;

1 Model HXE 6 Cyl. Motor Stand and transmission No. 327206;

120 HP Red Seal R-6-02-3602 Gas Motor with twin disc clutch;

120 HP Red Seal R-6-02-1040 Gas Motor with twin disc clutch;

35 HP Red Seal F226 Clutch C-103124, Specification No. 18557, P.A. 244-302;

Hercules Motor 95 HP Model RXLD 137290 (6 Cyl.);

Convey Motor, 35 HP Red Seal F 266;

Red Seal 55 HP M 290-425 Twin Disc Clutch for log haul;

Log Haul chain and equipment;

Chrysler Industrial 8 Cyl. Motor C-36, Ind. -9-99 Serial No. 7990—Automotive Clutch;

Green chain motor;

Continental Red Seal No. F 162-29341 and Clutch;

Air Cool Wisconsin 22 HP Model V.E. 4 Serial No. 869394 Specification No. 36756;

Wisco 6 HP Motor, Air cool;

2—350 Gal. water pumps, 1 stationary, 1 portable;

45 HP Gas Motor Jammer for Log Haul;

Small Head Rig and Carriage;

Big Head Rig and Carriage;

Edger;

Trim Saw;

Waste Conveyor;

2 Lath Machines;

Green chain, capacity, 80,000 ft.;

2 Boilers, Straw Burners;

Steam Rigger;

1 Double Head;

1 Single Head;

Saws and Filing Equipment;

Aluminum covered mill building, approx. 60x120 feet.

Dated this 19th day of February, 1951.

/s/ JAMES ALGER FEE,
U. S. District Judge.

[Endorsed]: Filed February 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

To R. G. Lilly and M. M. Valentine, Plaintiffs, and
Hicks, Davis & Tongue and U. S. Balentine,
their attorneys:

Notice is hereby given that Carl Rudeen, one of
the Defendants above named, hereby appeals to the
Circuit Court of Appeals for the Ninth Circuit from

the final judgment and decree entered herein on February 19, 1951.

/s/ ROBERT A. LEEDY,
BARZEE, LEEDY & KEANE,
Attorneys for Appellant Carl
Rudeen.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That

Whereas, Carl Rudeen, one of the Defendants above named, has given notice of appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment and decree made and entered herein on February 19, 1951:

Now, Therefore, United Pacific Insurance Company, a surety company qualified to do business in the District of Oregon, is by these presents firmly bound unto the Plaintiffs above named in the sum of Two Hundred Fifty 00/100ths Dollars (\$250.00).

The condition of this obligation is such that if Carl Rudeen, said Appellant, shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the

judgment is modified, then this obligation shall be void, but otherwise in full force and effect.

Dated this 21st day of March, 1951.

[Seal] UNITED PACIFIC INSURANCE
COMPANY,

Surety

/s/ By EDWARD T. LYNCH,
Attorney-in-fact.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1951.

— — —

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now Carl Rudeen, Defendant-Appellant herein, and states that the points on which he intends to rely on the appeal are as follows:

1. The evidence is insufficient to support the findings of fact.
2. The findings of fact are clearly erroneous.
3. The evidence will support only findings of fact leading to conclusions of law requiring a decree for this Defendant in accordance with his contentions herein.

/s/ ROBERT A. LEEDY,

Of Attorneys for Defendant-Appellant Carl Rudeen.

Acknowledgment of Service attached.

[Endorsed]: Filed April 3, 1951.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS

This matter coming before the Court upon the motion of Defendant-Appellant Carl Rudeen for an order directing the Clerk of this Court to transmit the exhibits herein to the appellate court, and the parties having stipulated through their attorneys of record that an order may enter for the transmission of said exhibits; now, therefore, it is hereby

Ordered that the Clerk of this Court be and he is hereby directed to transmit to the United States Circuit Court of Appeals for the Ninth Circuit all of the exhibits introduced in evidence herein, being numbered 1 to 30, inclusive, as described in the stipulation of the parties herein designating the record upon appeal.

Dated and entered this 16th day of April, 1951.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD UPON APPEAL

It Is Hereby Stipulated and Agreed by and between the Plaintiffs, through their attorneys of record, and the appealing Defendant, Carl Rudeen, through his attorneys of record, that the portions of the record, proceedings and evidence herein to be

included in the record on appeal shall be as follows:

Final judgment and decree;

Complaint;

Answer and cross-claim of Defendant Carl Rudeen;

Answer to cross-claim;

Pre-trial order;

Amendment to pre-trial order;

Findings of fact and conclusions of law;

Transcript of testimony;

All exhibits (numbered 1 to 30, inclusive);

Notice of appeal;

Bond on appeal.

Dated this 28th day of March, 1951.

/s/ THOMAS H. TONGUE, III.
Of Attorneys for Plaintiffs.

/s/ ROBERT A. LEEDY,
Of Attorneys for Appealing Defendant Carl Rudeen.

[Endorsed]: Filed April 3, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1949

Mar. 28—Filed petition for removal from Klamath County, Oregon.

Mar. 28—Filed bond of Carl Rudeen, petitioner.

Mar. 30—Filed notice of removal.

1949

- Apr. 5—Filed answer and cross-claim of deft. Carl Rudeen.
- Apr. 18—Entered order setting for pre-trial conference May 31, 1949. Fee.
- Apr. 20—Filed appearance of Hicks, Davis & Tongue, Edwin D. Hicks and William Hale, as attys. for pltf.
- Apr. 26—Filed motion for order for service by C. L. McCauley.
- Apr. 26—Filed and entered order for service by C. L. McCauley.
- Apr. 26—Filed praecipe of W. M. Davis for issuance of summons on Great West Lumber Corp.
- Apr. 27—Mailed summons to C. L. McCauley for service on Great West Lumber Corp.
- Apr. 29—Filed summons with return.
- May 13—At Pendleton: Set for P.T.C. June 7, trial June 8, 1949, at Klamath Falls. Fee.
- Jun. 7—At Klamath Falls: Entered order setting for pre-trial conference June 8, 1949. Fee.
- Jun. 7—At Klamath Falls: Filed answer to cross claim.
- Jun. 8—At Klamath Falls: Filed and entered pre-trial order.
- Jun. 8—At Klamath Falls: Record of trial before the Court, order allowing plffs 2 wks, deft. 2 wks thereafter and plffs 2 wks thereafter to file briefs. Fee.
- Jun. 17—Filed exhibits: Plffs 1 to 22; Deft. Rudeen 23 to 30 c.

1949

Jun. 27—Filed plaintiffs' motion for extension of time to file memorandum.

July 6—Filed transcript of testimony.

July 11—Filed and entered order allowing plaintiff to June 27, 1949 to file brief. Fee.

July 11—Filed plaintiffs' brief.

July 11—Filed and entered amendment to pre-trial order. Fee.

July 11—Filed motion of deft. Rudeen for extension of time to file brief.

July 11—Filed and entered order allowing deft. Rudeen to July 18, 1949 to file brief. Fee.

July 18—Filed brief of deft. Rudeen.

Aug. 1—Filed plaintiffs reply memorandum.

Aug. 1—Filed transcript of testimony June 8, 1949.

1950

Jan. 6—Entered order setting cause for final argument on Jan. 23, 1950 at 2 p.m. Fee.

Jan. 23—Record of trial (submitted). Fee.

Apr. 3—Record of opinion. Fee.

May 12—Filed motion for order of default as to Great West Lumber Corporation.

May 12—Filed stipulation as to amount of taxes due Klamath County.

May 22—Filed objections to proposed findings and conclusions.

May 22—Filed requested findings and conclusions of defendant Carl Rudeen and proposed amendments to findings and conclusions.

1951

Feb. 5—Entered order setting for hearing on objections to findings for Feb. 9, 1951. Fee.

1951

Feb. 9—Record of hearing on objections to findings.
Fee.

Feb. 9—Filed and entered order of default as to
Great West Lumber Corporation. Fee.

Feb. 19—Filed stipulation re taxes due.

Feb. 19—Filed and entered findings of fact and con-
clusions of law. Fee.

Feb. 19—Filed and entered judgment. Fee.

Feb. 24—Entered judgment in lien docket.

Mar. 21—Filed notice of appeal by deft. Carl Ru-
deen.

Mar. 21—Filed bond on appeal.

Apr. 3—Filed stipulation designating record upon
appeal.

Apr. 3—Filed statement of points on appeal.

Apr. 12—Filed motion for order for Clerk to send
exhibits.

Apr. 12—Filed stipulation for Clerk to send exhibits.

Apr. 16—Filed and entered order for Clerk to send
exhibits. Fee.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States
District Court for the District of Oregon, do hereby
certify that the foregoing documents consisting of
complaint, answer and cross-claim of Carl Rudeen,

Answer to cross-claim, pre-trial order, amendment to pre-trial order, findings of fact and conclusions of law, decree of foreclosure and order of sale, notice of appeal, cost bond on appeal, statement of points on appeal, order for transmission of exhibits, designation of record on appeal, and transcript of docket entries, constitute the record on appeal from a decree of said court in a cause therein numbered Civil 4401, in which R. G. Lilly and M. M. Valentine, doing business under the assumed name and style of Lilly & Valentine Trucking Company, are plaintiffs and appellees, and Carl Rudeen is defendant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of testimony dated June 8, 1949 filed in this office in this cause, together with exhibits Nos. 1 to 3 inclusive, 5 to 15 inclusive, 18 to 25 inclusive, 27 to 30-c inclusive.

I further certify that the cost of filing notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 23rd day of April, 1951.

[Seal] LOWELL MUNDORFF,
Clerk.

/s/ By F. L. BUCK,
Chief Deputy.

In the United States District Court for the
District of Oregon

Civil No. 4401

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,
Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a corporation, and CARL RUDEEN, and KLAMATH COUNTY, OREGON, a municipal corporation,
Defendants.

Before:

Honorable James Alger Fee, Judge.

Appearances:

Mr. Thomas H. Tongue, III, and Mr. U. S. Balentine, of attorneys for plaintiffs.

Mr. Robert A. Leedy, of attorneys for defendant Carl Rudeen.

TRANSCRIPT OF TESTIMONY

Klamath Falls, Oregon, June 8, 1949

Mr. Tongue: If your Honor please, there are two or three preliminary matters, if we may proceed with those things.

The Court: Yes.

Mr. Tongue: I might say that all of the pre-trial exhibits have been marked, and at this time, pursuant to stipulation, we will submit on behalf of the plain-

tiff all of the pre-trial exhibits marked for identification and listed in the pre-trial order as plaintiffs' pre-trial exhibits.

Mr. Leedy: There is no objection to their admission in evidence. The defendant also wishes at this time to offer the pre-trial exhibits marked for the defendant.

The Court: All exhibits are received by consent.

(The documents heretofore marked as Plaintiffs' Pre-Trial exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 (A and B), 13, 14, 15, 18, 19, 21 and 22, were thereupon received in evidence; and the documents heretofore marked as Defendant Rudeen's pre-trial exhibits 23, 24, 25, 27, 28, 29 (A to F), and 30 (A to C), were received in evidence.)

Mr. Tongue: One other matter before we proceed, your Honor. The drafting of this pre-trial order, as the Court can understand from its length, took some little time. At the beginning of its preparation, at the beginning of the drafting of the statement of admitted facts, we were assuming that there would be certain [2*] issues that, when we completed the order, were eliminated. Now, there are certain references under the admitted facts from which it may appear that there is a dispute between the parties as to whether this mortgage has been paid. That issue, however, has been eliminated and is no longer an issue in the case, and I wanted to clarify the rec-

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

ord on that point. Is that correct, Mr. Leedy?

Mr. Leedy: Yes, that is correct, Mr. Tongue. The pre-trial order in stating the contentions of the parties and issues makes no reference to the matter of payment, and the issues are correctly defined in the order itself.

Mr. Tongue: There is one other matter that I might call your Honor's attention to in that same regard which may otherwise lead to some misunderstanding. At the time of the beginning of these negotiations it appeared that there would be a further contention on the part of the Defendant Rudeen that some of the personal property secured by the mortgage, or specified in the mortgage, was in Deschutes County at the time or after the filing of the Government tax liens in that county, with the result that it was then expected that the Defendant Rudeen would contend that the mortgage was not prior to the tax lien as to any such items of personal property. There again I think it is understood that that contention is withdrawn and there is no issue on that matter. Is that right, Mr. Leedy?

Mr. Leedy: I think again, Mr. Tongue, it is a matter that [3] the pre-trial order correctly states the contentions and the issues, and there is no such contention or issue made and therefore it is not in the case.

Mr. Tongue: I just wanted to make that clear.

The Court: That is, as to the presence of personal property in Deschutes County?

Mr. Tongue: In Deschutes County, yes. That is, there is no issue arising out of the conflict between

the mortgage and the tax liens, which is one of the issues in the case.

The Court: I think we should have an amendment of the pre-trial order stating that, stating that there is no issue on that.

Mr. Tongue: They are not stated as issues, your Honor, nor are they stated——

The Court: If it is important enough to make a point of here it is important enough to put it in the pre-trial order.

Mr. Tongue: Very well.

The Court: You can agree that there is no issue on these matters, and you can state it and put it in the pre-trial order.

Mr. Tongue: Very well. Is it your Honor's pleasure that we proceed and then make those amendments later, or do you want to wait until those changes are made?

The Court: No, we will go right ahead. The pre-trial order will be amended in that respect.

Mr. Tongue: May I call my first witness?

The Court: Yes. [4]

MARION M. VALENTINE

one of the plaintiffs herein, was thereupon produced as a witness in behalf of plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Would you please state your name and your business, Mr. Valentine.

(Testimony of Marion M. Valentine.)

A. Marion M. Valentine, lumber hauler.

Q. Are you engaged in business in partnership with any person? A. Yes; Mr. Lilly.

Q. Under what name are you engaged in business?

A. Lilly & Valentine Trucking Company.

Q. How many trucks do you have for the purpose of conducting that business?

A. Nine trucks and a four-wheel trailer.

Q. How many employees do you have?

A. I have nine.

Q. Now, at any time did you haul lumber for the Great West Lumber Company?

A. At what time?

Q. At any time. A. 1947 to 1948.

Q. At the end of July of 1948 did that company owe you any money for the hauling of lumber? [5]

A. Yes, they did.

Mr. Tongue: By the way, that is stipulated to be in the amount of \$15,134.

The Witness: That is correct.

Mr. Tongue: Is that correct, Counsel?

Mr. Leedy: It is all in the pre-trial order, Mr. Tongue.

Mr. Tongue: What did you then do, Mr. Valentine?

A. I went to Mr. Balentine there, attorney.

Q. As the result of your conference with Mr. Balentine were certain legal proceedings instituted?

A. That is right.

Q. After those proceedings were instituted were

(Testimony of Marion M. Valentine.)

you contacted by anyone on behalf of Great West Lumber Company? A. Camozzi.

Q. Who was Mr. Camozzi, if you know?

A. He was the president and general manager.

Q. Did he come to see you?

A. Yes, he come up to Balentine's office.

Q. Was any understanding or agreement reached between you and Mr. Camozzi at that time?

A. You mean at that day?

Q. Yes, or as the result of those negotiations?

A. Well, yes. We was to settle——

Mr. Leedy: Just a moment, now. If the Court please, of course we object to the conclusion of the witness as to what his [6] agreement was.

The Court: You may testify to what each of you said.

Mr. Tongue: Mr. Leedy, we are content to rest on the statement in the pre-trial order under the admitted facts, Paragraph 16, as to those terms of the agreement that were reflected in that paragraph.

Mr. Leedy: I assumed that was the purpose of the agreement, to eliminate the necessity of testimony.

Mr. Tongue: Q. Now, Mr. Valentine, was there any discussion at that time as to the execution of a mortgage on behalf of the Great West Lumber Company to Lilly & Valentine? A. Yes.

Q. What was said by Mr. Camozzi, if anything, on that point?

A. Well, he made some phone calls, and he was to give us a \$10,000 mortgage and a \$6,000 note.

Q. Was there any discussion with Mr. Camozzi

(Testimony of Marion M. Valentine.)

as to the items of equipment or personal property that were to be covered by that mortgage?

A. There was to be one complete sawmill and the land.

Q. One complete sawmill and the land; is that what you said? A. That is right.

Q. Was there any discussion of whether the various items of equipment included in the sawmill should be specified in the mortgage?

A. No, it was an automatic trim saw, a planer, and numerous [7] motors and chains.

Q. Did you know at that time all of the items of personal property at the sawmill?

A. I did not.

Q. Will you say "Yes" or "No." The Reporter doesn't get it when you shake your head.

A. No.

Q. Where was the sawmill located in reference to Klamath Falls?

A. About 100 miles north of Klamath Falls.

Q. Was there any reason at that time why Mr. Camozzi was anxious to have this matter expedited and the mortgage executed as quickly as possible?

Mr. Leedy: Objected to as calling for a conclusion of the witness.

Mr. Tongue: I will withdraw the question.

Q. Did Mr. Camozzi state that he was anxious to have the mortgage executed at any particular date?

Mr. Leedy: Objected to as leading and calling for an assumption.

(Testimony of Marion M. Valentine.)

The Court: Yes.

Mr. Tongue: Q. Did Mr. Camozzi make any statement as to when he wanted the mortgage executed?

A. The mortgage was due within sixty days.

Q. I am referring to the original execution of the mortgage and the discussions leading to its execution. My question is [8] whether Mr. Camozzi said anything and, if so, what he said, as to when he wanted this matter concluded. Did he say that there was any reason why he wanted the mortgage executed and the matter settled as soon as possible?

A. That is right; he did.

Q. What did he say?

A. Well, he said he wanted me to come right down. He wanted to settle right away.

Q. Was a preliminary injunction then issued by the Court restraining the sale of lumber by the company?

A. That is right; there was.

Q. Was there any discussion of that restraining order as a reason for expediting the settlement of this matter?

A. Yes.

Q. Was that discussed as one of the reasons for not going to the mill and getting a list of the property in detail?

A. That is right.

Q. What was your understanding and intent, if you had any such understanding or intent, as to what items of personal property were to be included under this mortgage?

Mr. Leedy: If the Court please, I deem that objectionable as calling for the intent. It is not material

(Testimony of Marion M. Valentine.)

what his inner intent may have been. It is what was said and done on that occasion.

Mr. Tongue: Your Honor, it is my contention that the intention [9] of both parties as to the items to be covered by the mortgage is material on the issue of the interpretation to be given to the mortgage and also on the issue of reformation, which is one of the issues in this case.

The Court: Objection sustained. It is the intention of the parties as expressed. If the mortgage was incorrectly drawn, it must be shown to have been incorrectly drawn from definite statements that were made to the scrivener.

Mr. Tongue: To whom?

The Court: To the scrivener; to the person who drew it.

Mr. Tongue: We don't claim that it was mistakenly drawn. It is just a question, primarily, of interpretation, your Honor, which according to our position rests on the intent.

The Court: That might be, but then the interpretation of a written document is based upon the writing.

Mr. Tongue: Very well.

Q. Mr. Valentine, you have testified that Mr. Camozzi, according to your understanding, was the president and general manager of the corporation; is that right? A. Yes, sir.

Q. Had you been around the sawmill on any occasions? A. Several occasions, yes.

Q. Did you ever have occasion to observe to whom

(Testimony of Marion M. Valentine.)

questions were referred for orders or directions?

A. Mr. Camozzi. [10]

Q. Did you ever see anyone at the mill who was or was represented to be an officer or director of the corporation other than Mr. Camozzi?

A. No, sir.

Q. From your observation, in your dealings with the Great West Lumber Company who appeared to be in charge of the operation?

A. Mr. Camozzi.

Q. Do you have any personal knowledge as to whether or not Mr. Camozzi purchased the sawmill equipment that was installed in the mill after the Great West Lumber Company took over the mill?

A. I have not.

Q. Did Mr. Camozzi in his dealings with you ever refer to any other person or source for authority to make the—to make any decision?

A. No, sir.

Q. Did he ever make any statement to you that he had full authority?

Mr. Leedy: That is objected to, your Honor. You can't prove the authority of an agent by the extra judicial utterances of the agent.

Mr. Tongue: There is some question whether that goes to the question of apparent authority or estoppel, your Honor.

The Court: I think he may answer that.

Mr. Tongue: Would you restate the question?

(Last question read.)

A. Yes.

(Testimony of Marion M. Valentine.)

Q. What did he say, if anything?

A. He says, "I am the big shot around here." He mentioned that several times.

Q. I assume that after these conversations that you have recited with Mr. Camozzi there was what purported to be a mortgage executed by him to you; is that right? A. That is right.

Q. Did your firm do any further hauling for the Great West Lumber Company after that date?

A. After the mortgage?

Q. Yes.

A. Yes, he asked us to continue hauling.

Q. And that was on about what date, if you remember? A. I am not sure. It was after—

Q. Does it refresh your recollection if I tell you that the mortgage was executed on August 4th, 1948, according to the stipulation of the parties?

A. Right after the mortgage we started hauling again.

Q. Were you paid promptly for the further hauling that you performed for the company?

A. No, sir.

Q. Did you have any discussions with Mr. Camozzi as to the question of payment for this further work? [12]

A. Yes. When we continued hauling for him we told him if he would keep the payments up for hauling, why, we would continue hauling for him.

Q. Was there any discussion of payments due on the mortgage in that connection?

(Testimony of Marion M. Valentine.)

A. We told him we would let the mortgage ride the way it was until he paid up his current bills.

Q. At that time did you assume that the mortgage was a good and valid obligation of the company?

Mr. Leedy: That will be objected to, your Honor.

The Court: Objection sustained.

Mr. Tongue: Your Honor, may I make this one statement? I will make it brief. One of the contentions of the plaintiffs in this case is that the defendants not only retained the benefits of the mortgage but by their conduct are estopped from questioning the authority to execute the mortgage, and in that connection we submit that it is material to show that the plaintiffs relied on the validity of that mortgage.

The Court: That is not conduct of this particular defendant, as I understand it. This Defendant Rudeen had nothing to do with that.

Mr. Tongue: No. It is not conduct of his; that is right.

The Court: That is the basis of estoppel, is his conduct.

Mr. Tongue: He was one of the directors of that company at that time and still is. [13]

The Court: Even so, the assumption by this witness that the mortgage was valid would have nothing to do with the conduct of either of them.

Mr. Tongue: Very well.

Q. Did you have any difficulty in collecting payment for that further work conducted for the company?
A. Yes.

(Testimony of Marion M. Valentine.)

Q. As I take it, there was a second lawsuit filed in that connection; is that right?

A. That is right.

Q. And there was a certain attachment issued to the American Lumber & Box Company as a result of that suit; is that right?

A. That is right; yes, sir.

Q. Now, Mr. Valentine, was there any further agreement or discussions between yourself and Mr. Camozzi as a result of that second lawsuit filed on your behalf?

A. Well, he come right up to the office.

Q. What was done and said at that time, if you know?

A. And he authorized Fleishman to give us half of what he had coming.

Q. What do you mean by that? Can you be a little more specific in what he did in that regard?

A. Yes. Well, when we continued hauling, you see, Fleishman received the lumber and he was to give us half of what Fleishman sent him—You know—give him. [14]

Q. You mean Fleishman was to pay to you half of what Fleishman owed to the Great West, is that right?

A. That is right.

Q. Was there any other discussion or understanding reached between you and Camozzi at that time?

A. The only thing, he asked us to quit hauling.

Q. Had you already stopped hauling?

A. That is right; we had already stopped.

(Testimony of Marion M. Valentine.)

Q. Was there any discussion of this attachment filed against the American Lumber & Box Company?

A. I don't remember.

Q. I didn't get that.

A. I don't remember what the discussion was.

Q. Was there ever any discussion of the attachment filed against the American Lumber & Box Company and any means that were to be taken or discussed to release the attachment?

A. Yes, he authorized—That is, he said he would haul enough lumber over there to take care of the attachment.

Q. In what amount? A. \$4,000.

The Court: I don't understand that.

Mr. Tongue: Your Honor, I think one of the agreed facts as it appears in Paragraph 24 of the pre-trial order, on Page 7, is that at the time of this second suit an attachment was issued on the American Box Company, and then in the latter part of [15] that paragraph it states that the sum of \$4,000 was paid to plaintiffs as a result of that attachment. That is the matter that is referred to by this testimony.

The Court: He talks about "him" or somebody. I can't understand who it is. First he says "he authorized" and then he said something else. I don't understand him.

Mr. Tongue: Q. When you say "him" are you referring to Mr. Camozzi? A. Yes, sir.

The Court: What did Camozzi do? Let's find out.

(Testimony of Marion M. Valentine.)

Mr. Tongue: Q. What did Camozzi do with reference to this attachment?

A. Camozzi said he would continue getting lumber over there until he raised the \$4,000.

The Court: Over where?

A. Over to the American Box in Lakeview, until he raised the \$4,000.

Mr. Tongue: Q. Was there any discussion between you and Mr. Camozzi as to how the payments were to be applied that were to be made by Fleishman to you on account of the Great West Lumber Company?

A. Well, we let the mortgage go ahead and take care of itself, and we applied the money to the open account.

Q. Was that discussed between you and Mr. Camozzi? A. I don't remember, sir. [16]

Q. Did you discuss with Mr. Camozzi whether or not the payments from Fleishman should be applied to the open account or to the mortgage, or how they should be applied?

A. Should be applied to the open account.

Q. What did he say, if anything?

A. It was all right.

Q. Pardon? A. It was all right.

Q. Was there any discussion at that time between you and Mr. Camozzi as to any claim made on your behalf for costs and attorney's fees in that case? A. It was \$750 attorney's fees.

Q. Did that include costs?

A. Yes, that is right.

(Testimony of Marion M. Valentine.)

Q. What did Mr. Camozzi say as to that?

A. It was okeh.

Q. Now, as I take it, Mr. Valentine, there were certain payments that came in later through the Fleishman Lumber Company after the suit was filed and after those discussions were had between you and Mr. Camozzi; is that right?

A. That is right.

Q. The amount of those payments is reflected in the pre-trial order under the admitted facts. Now, Mr. Valentine, when did you first learn that any tax liens had been filed against Great West Lumber Company? [17]

A. I found a letter that the Government issued.

Q. Did you receive a copy of such a letter?

A. I did not, no.

Q. Did you see such a letter? A. I did.

Q. About when did you see that letter, if you remember?

A. Oh, I believe it was in June, around the first of June.

Q. Of what year? A. 1948.

Q. 1948. Did you at any time learn that there was to be a proposed sale of the assets of the company for delinquent taxes? A. Yes.

Q. Do you remember when you first learned that?

A. In the letter—I think I made a mistake on that. I think that was January the 1st, wasn't it?

Q. Of what year? A. 1949.

Q. When you learned of the tax liens?

A. Yes.

(Testimony of Marion M. Valentine.)

Q. Did you then also learn that a sale was contemplated as a result of those liens?

A. Yes, the sale should be called on January the 27th, I believe.

Q. What did you then do, if anything?

A. I went down to the bank to make preparations to bid the mill in to protect our mortgage. [18]

Q. After you did that did you receive any communications from the company or anyone connected with the company?

A. Yes, I received a letter from Utah.

Q. There is now handed to you a document entitled Defendant's Pre-Trial Exhibit 29-A. I will ask you to look at that document and tell me if that is the letter you received at that time.

A. That is right.

Q. What did you then do after receiving that letter, if anything?

A. Well, we figured that the mortgage—

Mr. Leedy: Just a moment. If your Honor please, we will object to what the witness figured.

The Court: Yes.

Mr. Tongue: Q. What did you do, if anything, after receiving that letter? Did you continue with your negotiations with the bank or did you abandon them? A. Abandoned them.

Q. Did that letter have any bearing upon your abandoning those negotiations with the bank?

A. Yes, sir.

Q. Was that the reason why you abandoned those negotiations with the bank? A. Yes, sir.

(Testimony of Marion M. Valentine.)

The Court: This examination is extremely leading, Mr. Tongue.

Mr. Tongue: I will try to be more careful, your Honor.

Q. Do you know whether a tax sale was held at any later date? [19]

A. There was one held, I think, January the 27th.

Q. Were you present at that time?

A. Yes, sir.

Q. Was a sale consummated at that time, or do you know whether a sale was consummated at that time?

A. It was not. There was no sale.

Q. Do you know whether or not there was any later tax sale?

A. About thirty days. It must have been around February, or something like that; the last of February or the first of March, something like that, there was a sale.

Q. Were you present at that time?

A. Yes, sir.

Q. Do you have any recollection of what happened or what was done or said at that time?

A. Yes, sir.

Q. Would you please state what your recollection is as to what you observed or as to what happened and what was done and said at that time.

A. The mill was sold for \$7,500 prior to our first mortgage of \$10,000.

The Court: That is stricken.

(Testimony of Marion M. Valentine.)

Mr. Tongue: Just a moment, Mr. Valentine. I consent that that be stricken, your Honor.

Q. Do you remember whether or not there was any discussion of the mortgage at the time of that sale? [20]

A. There was no discussion, no.

Q. How is that?

A. No.

Q. Do you remember whether anyone on that occasion had anything to say on the subject of the mortgage?

Mr. Leedy: Now, if your Honor please, the witness has already stated that there was no discussion, or he does not recall it. This is an attempt to elicit it by leading the witness.

The Court: No, that is all right, if anybody said anything about the mortgage.

(Last question read.)

The Witness: He said the mortgage——

The Court: Now, just a moment. Who was it, and whom did he say it to?

Mr. Tongue: Q. Who was it?

A. The Government man.

Q. Do you know his name?

A. No. He said that our mortgage was prior at the sale.

Q. Are those the words he used, as you remember, or, if not, what did he say, if you remember?

A. I don't remember just——

(Testimony of Marion M. Valentine.)

Mr. Leedy: Then we will move that the answer be stricken as being a conclusion of the witness.

The Court: Stricken. [21]

Mr. Tongue: Q. Can you recall anything that the Government representative said at that time relating to the mortgage?

A. He said that our mortgage was prior to the sale. That is all I can remember.

Q. Up to that time had there been any question raised or any communication received by you from the company or anyone on its behalf concerning the mortgage?

A. Yes. There was another letter from——

Q. Did you receive another letter before the sale?

A. Yes.

Mr. Tongue: I will ask that Pre-Trial Exhibit 29-b be shown to the witness.

Q. There has been handed to you a document entitled Defendant's Pre-Trial Exhibit 29-b. It appears to be a letter bearing what date?

A. February 17, 1949.

Q. Does that refresh your recollection any on this matter? A. Yes.

Q. Was that the second letter you received from the company, or did you receive some other letter prior to that date and after the one previously shown to you?

A. That is the second letter that I received.

Q. The one that you now have in your hand?

A. Yes, that is right.

Q. Can you now testify as to whether or not you

(Testimony of Marion M. Valentine.)

received that [22] letter before or after the tax sale?

A. That was after the tax sale.

Q. At any time either before that date or after that date did the company or anyone on its behalf or connected with it raise any question as to the validity of the mortgage? A. No.

Q. They did not do it before the sale?

A. No.

Q. Did they after the sale?

A. Not to my recollection.

Q. You know, don't you, that the question has been raised in this case? A. Yes.

Q. When was the first time, to your knowledge, that that question was raised?

A. When we started foreclosure.

Q. In this case, do you mean?

A. On the mortgage.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Mr. Valentine, do I understand correctly that you went to the bank to try to arrange financing to bid in this property before the first tax sale, before the first time the property was offered for sale? [23]

A. Yes, sir.

Q. And you abandoned those efforts before the first sale; is that correct?

A. After I got this first letter.

Q. Now, you are sure that you abandoned your efforts before the first sale because of this letter from Mr. Rudeen; is that correct? A. Yes, sir.

(Testimony of Marion M. Valentine.)

Q. Do you remember how long it was after the first offering that the property was actually sold?

A. It was over thirty days. I don't know just—

Q. Would it help your recollection any of the actual date of sale to look at the certificate of sale showing that the property was sold on January 27th, 1949? Does that date sound right to you as the time it was actually sold?

A. No.

Q. About when do you think it was sold?

A. About a month later than that; sometime in February.

Q. What is the date of the second letter you had from Mr. Rudeen?

A. February the 17th.

Q. You think that was before or after the actual sale?

A. That was after the sale.

Q. Did you attend the first time the property was offered for sale?

A. Yes, sir. [24]

A. At that time you were not prepared to bid; is that right?

A. That is right.

Q. And the reason you were not prepared to bid is because you had this letter from Mr. Rudeen; is that correct?

A. That is right.

Q. Do you remember at the first time the property was offered for sale that Mr. Ellison, the Government representative, stated that it was the position of the Government that their tax liens were ahead of your mortgage in so far as the personal property was concerned?

A. I don't remember that.

Q. Would you say that he did not make a statement to that effect?

A. No, sir.

(Testimony of Marion M. Valentine.)

Q. In other words, you don't remember whether he did or did not? A. That is right.

Q. So you don't know now, then, whether or not the Government asserted the invalidity or partial invalidity of your mortgage at the time the property was first offered; is that right? Did you answer the question? A. No, sir. I don't remember.

Q. Now, then, do you remember the occasion——
Mr. Tongue: What was that answer?

The Court: He said he didn't remember.

Mr. Leedy: Q. Do you remember the occasion when the property [25] was actually sold? Were you present? A. Yes.

Q. Do you remember seeing Mr. Rudeen there?

A. Yes.

Q. And was Mr. Ellison, the same Government representative, conducting the proceedings as conducted the previous proceedings? A. Yes.

Q. Isn't it a fact, Mr. Valentine, that at that time Mr. Ellison again stated that the Government claimed their tax liens to be ahead of your mortgage as far as the personal property was concerned?

A. I don't remember that.

Q. You would not say now whether he did or did not make such a statement? A. No, sir.

Q. Isn't it a fact that at that occasion Mr. Rudeen asked Mr. Ellison before the sale actually was made whether the Government would guarantee the sale to be free of the mortgage as far as the personal property was concerned?

A. I don't remember that either.

(Testimony of Marion M. Valentine.)

Q. You would not say now whether Mr. Rudeen did or did not make such a statement or ask such a question? A. Not at the moment, no.

Q. Do you remember Mr. Ellison making the statement that the personal property had liens attached in Deschutes County before [26] it was brought down to the mill, and for that reason the tax liens were prior?

A. No, I don't remember that.

Q. Did you attend the meeting indicated in the letter, Defendant's Pre-Trial Exhibit 29-a? If you will refer to the last page, I think you will find that there was a meeting to be held in Bend around the 15th of January, 1949.

A. I know, but I did not attend it.

Q. Did you have a representative there?

A. No.

Q. You don't know what took place at that meeting? A. No; that is right.

Q. If you felt your mortgage was prior to the tax liens, why did you feel it necessary to negotiate with the bank for a loan to protect your mortgage?

A. Well, I didn't know at that time, when I made the statement, whether the tax lien was to go in effect. I didn't know what to do when I did that.

Q. Did you consult Counsel before making negotiations with the bank for financing?

A. Mr. Balentine.

Q. On his advice you entered into negotiations with the bank for the purpose of raising these funds?

A. Bidding in the mill, yes.

(Testimony of Marion M. Valentine.)

Q. Do you still say that you had no intimation that anyone [27] claimed your mortgage was invalid until this foreclosure case was started?

A. Will you repeat that again?

(Last question read.)

A. No.

Q. Do you remember receiving the letter, Defendant's Exhibit 29-b, dated February 17th?

A. That is right.

Q. Do you remember reading in there that Mr. Rudeen said he hoped to obtain a compromise of the mortgage?

A. Yes, sir.

Mr. Leedy: That is all.

Mr. Tongue: No further questions.

(Witness excused.)

(Short recess) [28]

U. S. BALENTINE

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. What is your occupation, Mr. Balentine?

A. Attorney-at-law.

Q. Are you attorney for the plaintiffs in this case?

A. I am.

Q. How long have you acted as their attorney?

A. I have represented them since in July of 1948.

(Testimony of U. S. Balentine.)

Q. I take it you were their attorney in the filing of these suits that have been mentioned as having been filed late in July of 1948?

A. Yes, that is correct. I was their attorney.

Q. Did Mr. Camozzi come to your office after the filing of this suit?

A. He came within the next day or two after they were served, which was, I think, the day they were filed. They were served in Bend, because Mr. Valentine and I drove to Bend to get Judge Vandenberg's signature on the papers. He was holding court in Bend at the time. My recollection is that we got the sheriff Saturday morning, just before he left at noon, and left the papers with him. Whether they were served that day or the following Monday I am not sure, but immediately after service [29] Mr. Camozzi came to my office.

Q. Were there any discussions in your office between yourself and Mr. Camozzi and Mr. Valentine?

A. Yes, there were a great many.

Q. Will you state what, if anything, was said by Mr. Camozzi at that time?

A. Mr. Camozzi came into my office and introduced himself as president and general manager and in complete control and charge of the Great West.

Mr. Leedy: Now, if the Court please, we object to that last statement and move it be stricken as a conclusion of the witness. At this time we would like to have the record show that the Defendant Rudeen contends that Camozzi, the president and general manager, was without authority to execute this mort-

(Testimony of U. S. Balentine.)

gage or to negotiate for it or to make statements in connection with it that were in any way binding upon the Great West Lumber Corporation.

Mr. Tongue: Your Honor, I think it has already been ruled on a similar objection that it may be testified by the plaintiffs' witnesses what Camozzi said as to his authority on the issue of estoppel or apparent authority, which is one of the issues of this case.

The Court: I will receive it for what it is worth.

Mr. Tongue: Go ahead, Mr. Balentine.

A. Mr. Camozzi came into my office—That is the first time [30] that I ever met him—and introduced himself as president and secretary and in full charge of—

Q. Secretary, did you say?

A. President and general manager. I would like to correct that—and said that the papers had been served on the company's attorney-in-fact in Bend, and that he wanted to settle the matters up for the reason that anything stopping the sale of their lumber would close the operations down. And I got in touch with Mr. Valentine—He did most of it; my contacts were principally with him—and he came up, and we discussed the matter of what could be done in reference to settling these two lawsuits, the equity and the companion law case.

Q. As the result of those discussions were you instructed to prepare a certain mortgage?

A. Yes. It was agreed between the parties there in my office the \$6,000 cash be paid and a \$10,000 security be given in order to get these cases dismissed.

(Testimony of U. S. Balentine.)

And the \$6,000, Mr. Camozzi said, could be had from the Fleishman Lumber Company, their head office in Portland, to whom he was shipping the entire output of the mill. And at that time also he showed me a contract with the Fleishman Lumber Company that he had entered into as general manager of Great West to furnish the entire output of the mill during this season to Fleishman Lumber Company. We had several telephone conversations with Mr. Fleishman in Portland. Over a period of a few days there he came back daily to the office——[31]

Q. Who do you mean by "he"?

A. Mr. Camozzi. Excuse me. He came back daily to the office. We had several telephone conversations with Mr. Jim Fleishman, in charge of the Fleishman Lumber Company in Portland. Then in those conversations it developed that the Fleishman Lumber Company, through Mr. Jim Fleishman, did not admit that there was \$6,000 then due the Great West, but did indicate that he would personally secure in a satisfactory manner the amount of \$6,000. So I agreed to meet Mr. Camozzi in Portland, and Judge Vandenberg was then in Portland holding court, and I prepared a mortgage, the one that is in evidence here.

Q. Did you receive any instructions as to the preparation of that mortgage?

A. Yes. I received instructions from Mr. Camozzi as to the preparation of that mortgage.

Q. What did he tell you?

A. He told me in reference to the description of

(Testimony of U. S. Balentine.)

the mortgage that he had no way of giving me itemized descriptions of the various items of property.

Mr. Leedy: If the Court please, we object to this whole line of testimony. We object further to this particular line of testimony in so far as it goes to vary or contradict the terms of a written instrument which is here in evidence.

Mr. Tongue: I am not trying to vary or contradict it. I am simply showing the meaning of the general terms——[32]

Mr. Leedy: Or to explain it.

Mr. Tongue: I submit, you Honor, that one of the qualifications of the parole evidence rule is that where general terms are used in an instrument parole evidence is admissible to show the circumstances under which the instrument was executed as going to show the intention of the parties in the use of those general terms.

The Court: I think that is the rule. However, I will take this evidence over the objection.

Mr. Tongue: Very well. Would you read the question, please.

The Court: He said he had no way of giving him the items of personal property.

The Witness: Yes, except as to the large items that were there at the mill. And he gave me the description of some of the larger items of personal property there in the mill, that went to make up the mill, and those are the items that are specified in the mortgage. Then he gave me the further specification of the complete sawmill equipment as it then existed.

(Testimony of U. S. Balentine.)

Mr. Tongue: Q. That is, there were numerous other gas engines and other equipment there?

A. Yes. Those are his exact descriptions, which he told me was as nearly as he could make it.

Q. Now, as I understand it, Mr. Balentine, that mortgage was then executed by him purportedly on behalf of the corporation? [33]

A. In Portland. We went to Mr. Fleishman's office—I believe it is in the Lumberman's Building in Portland.

Q. What was then done with reference to the cases that were pending?

A. I had secured——

Mr. Tongue: I will withdraw that. It is stipulated they were dismissed.

Q. What was then done with the mortgage?

A. The mortgage was then placed of record in Klamath County after its execution.

Q. Did you make any search of the records at that time or thereabouts?

A. I personally had searched the records here in Klamath County prior to drawing the mortgage and going to Portland, and either before it was executed or soon thereafter I got a search from the Wilson Abstract Company. I am not sure whether that was before the mortgage was executed or afterwards, but I had personally searched the records and I found, after being told of this before by Mr. Camozzi, I found that there was a mortgage from the old B & C Company of record here on the personal property.

Q. I think that is stipulated. Did you find any other——

(Testimony of U. S. Balentine.)

A. Outside of that one, it was clear.

Q. Now, there has been testimony, and it is stipulated in this case, that after that mortgage was executed and filed there was [34] further work performed by Lilly & Valentine, and later a further lawsuit filed in their behalf, and that later certain payments were made by Fleishman to Lilly & Valentine on behalf of Great West Lumber Company. Did you at any time give any instructions to Fleishman with respect to those payments?

A. To Fleishman?

Q. To Fleishman, yes. A. Yes, I did.

Q. What did you do? What instructions did you give?

A. I wrote a letter to Mr. Fleishman terminating those payments.

Q. What was the reason for writing that letter?

A. My reason for writing that letter was this: That the second suit was brought for hauling after the mortgage from the 4th of August until the time of the suit, and when that case was filed, before it was served on the Great West attorney-in-fact in Bend, but after an attachment was served in Lakeview, Mr. Camozzi came into the office and negotiated concerning that lawsuit, and it was agreed that he was to continue to ship sufficient green lumber that he was then cutting to the garnishees in Lakeview until the amount of \$4,000 was accumulated over there. He had previously given instructions to Fleishman to give up one-third of the amount due

(Testimony of U. S. Balentine.)

the Great West on the deal with Fleishman. At this time, after the second lawsuit was filed—the third, actually; the two first ones and the next lawsuit—he agreed to increase that to half of the amount until that second lawsuit [35] was taken care of. And when that had been paid off I wrote Fleishman a letter that he might discontinue the payment of one-half of the Great West money to us.

Q. Are you referring to the letter written by you to Fleishman Lumber Company designated as Plaintiffs' Exhibit 14, dated November 1st, 1948?

A. That would be the letter.

Q. Now, Mr. Balentine, did you at any time learn that the Government was proposing to sell the saw-mill because of tax liens?

A. Yes, I learned——

Q. When did you first learn of that?

A. I personally learned about that soon after November 2nd.

Q. Did Lilly & Valentine ever come in to you and ask for advice in that respect?

A. Yes, they did.

Q. When did they first come to you, if you remember?

A. They came to me sometime in December, I will say, or at least by that time.

Q. Did you advise them what they should do or whether they should do anything with respect to that proposed sale?

A. I advised them——

Mr. Leedy: We object to that, of course, to what he advised them. Whether or not he advised them we

(Testimony of U. S. Balentine.)

have no objection to. It would not be binding on this defendant or anyone else as to what advice he gave them. [36]

Mr. Tongue: Your Honor, this in a sense is preliminary. What I want to develop through this witness is not only the circumstances of the sale at which he was present, but also I want to develop through this witness the fact that the plaintiffs brought to him this letter written by Mr. Rudeen and asked his advice, and what that advice was. It goes to the issue of our claim that the Defendant Rudeen is estopped to challenge the validity of the mortgage and to claim that the mortgage was inferior to his title under the tax sale because of his conduct, including among other things the writing of these letters to the plaintiffs.

The Court: Objection overruled.

Mr. Tongue: Would you read the question?

(Last question read.)

A. When they first came to me in reference to the Government's claim of taxes, I came over and looked at the Klamath County records here, and there had been a series of filing of notices, beginning with November 2nd, is my recollection, here in Klamath County; and in the aggregate I learned along during this course of discussing it with my clients that the Government was claiming some \$35,000 as tax liens. I discussed that situation with them, but at that time I was not myself sufficiently conversant with the law of the priority of Government liens

(Testimony of U. S. Balentine.)

to be entirely satisfied to advise them on the situation. So I investigated from the legal standpoint, and I advised them that since there was [37] that much money involved in the Government lien I did not believe it would be good business for them to invest that much more money in that property up there.

Q. Are you referring to the first or the second sale? A. The first sale.

Q. Do you recall how much the property was offered for at that first sale?

A. I didn't attend the first sale, because the Government's lien, as I say, was some thirty-five thousand or thirty-six thousand dollars, as I remember it. I did not attend the first sale. After it he came back and consulted me again and reported to me that—

The Court: Now, just a moment.

Mr. Tongue: Just a moment, Mr. Balentine.

Q. Did you later learn that there was to be a subsequent sale?

A. Yes, I did, and I later learned—

Q. Just a moment. Did your clients come to consult you and ask your advice as to what they should do with reference to the second sale?

A. They did that, yes.

Q. Did they or did they not show you a letter written by Defendant Rudeen under date of January 6 in that connection?

A. Mr. Valentine brought that letter to my home on receipt of it, to me.

Q. Did you advise them under those circumstances?[38] A. Yes, I did.

(Testimony of U. S. Valentine.)

Q. And after seeing that letter?

A. Yes, I advised them in the light of that letter.

Q. What was your advice to them at that time?

A. I advised them that, having recognized that mortgage, I didn't think——

Q. What do you mean?

A. The mortgage in question here.

Q. How do you mean the mortgage was recognized?

A. It is in the letter referred to, the exhibit referred to, as the letter sent to Lilly & Valentine of January the 7th, is my recollection of it.

Q. I show you this letter dated January 6th, 1949,——

A. The 6th.

Q. ——designated as Defendant's Pre-Trial 29-a, and ask you if that is the letter to which you have reference?

A. Yes, that is the letter.

Q. I now ask you what advice, if any, you gave to the plaintiffs at that time?

A. I advised them that the company, through this letter, was recognizing their mortgage as a binding mortgage. In the meantime I had checked the law in reference to the priorities of these tax liens, and it was my advice to them at that time that they would not be required to raise any money to bid at these tax sales. I had previously been to the bank with them on the question [39] of arranging for money.

Q. Did you later attend the second sale?

A. I attended the second sale.

(Testimony of U. S. Balentine.)

Q. Do you have any recollection of what was said and done there? A. Yes, I do.

Q. Would you state what your recollection is as to what was done and said at that time?

A. That sale was conducted, according to my recollection, on the 27th day of January, 1949, at the millsite of the Great West Lumber Corporation. I went up there in company with Mr. Lilly and Mr. Valentine both. We got there some little time before the sale started, the actual auction and bidding started. We saw Mr. Ellison and had a talk with him.

Q. Who was he?

A. He was the Government representative in charge of conducting the sale. Then the sale started, and Mr. Ellison announced as a preliminary to accepting bids to all the parties present there that the sale was conducted subject to a \$10,000 mortgage to Lilly & Valentine, and that the Government was selling it subject to that mortgage, with one contingency on the part of the Government: That, according to the information the Government had, some of the articles of personal property had been purchased in Bend after the Government had filed their lien in Deschutes County, and that as to those items it was the contention that the Government's lien attached to those items and would follow [40] them in Klamath County, and that was the only exception to selling—to the fact that it was being sold subject to this particular mortgage.

Q. Did you see Mr. Rudeen at that sale?

A. I saw him, yes, and talked to him.

(Testimony of U. S. Balentine.)

Q. Did he make any statement in the presence of Ellison and the other people at that time that you recall?

A. Mr. Rudeen made some statements during the course of the sale that I heard. One of Mr. Rudeen's statements was he inquired of Mr. Ellison if the Government would guarantee title to the personal property to any person who bought it.

Q. Do you remember any other statement that Mr. Rudeen made at that time?

A. That is the only statement that I remember him making at that time.

Q. Did Mr. Ellison make any reply to that statement that you remember?

A. Yes. Mr. Ellison told him that it was the Government's contention that any articles of personal property bought out of Deschutes County after their lien was filed there, that the lien on those items would still attach in Klamath County. Then Mr. Ellison addressed me in the audience there, as the attorney for Lilly & Valentine, and asked me what our position was.

Q. Did you reply to that request for a statement?

A. I did. I told him that it was our position that the \$10,000 [41] mortgage was prior to the Government's lien.

Q. What else was done or said at that time, if you remember, if anything?

A. After that the sale was adjourned and then reconvened in just a few minutes, and again offered for a lower figure than it had been offered before.

(Testimony of U. S. Balentine.)

Q. Were any bids submitted there?

A. Yes. Mr. Rudeen submitted a bid of \$7,500, and the bid was accepted.

Q. Do you know whether prior to that sale the Great West Lumber Company, or anyone on its behalf or in connection with it, had made any contention that this mortgage was invalid for lack of authority to execute it?

A. No contention had ever been made to me.

Q. Or any that you know of?

A. None that I know of.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Mr. Balentine, during the summer of 1948 did you perform professional services for the Great West Corporation as your client?

A. On one occasion while we were trying to get payment on the \$6,000 note which became in default, that Mr. Fleishman had given, had signed personally, in addition to this \$10,000, I wrote a [42] letter for Mr. Rudeen to Mr. Fleishman——

Q. You mean Mr. Camozzi?

A. Mr. Camozzi; excuse me—Mr. Camozzi to Mr. Fleishman concerning the contract which existed between the two.

Q. About when was that?

A. Oh, that—I will estimate it the best I can. That would be some time—the note was due in ten days, the \$6,000 promissory note was, and it was

(Testimony of U. S. Balentine.)

after that time and before this second suit was started.

Q. Some time during the latter part of August or September of 1948; is that right?

A. I presume that would be about right.

Q. Did you render any other professional services for Great West?

A. That is all that I have.

Q. Or Camozzi personally?

A. That is all.

Q. Now, I understand that when Mr. Valentine, one of your clients, showed you this letter which is in evidence here, the one of January 6th, 1949, Defendant's Exhibit 29-a, you advised them that that letter constituted a recognition by the company of the mortgage; is that right?

A. That is what I told him.

Q. As of that date, January 6th, 1949, the date the letter was written? [43]

A. Yes.

Q. And that was your basis of advising them that they need not protect themselves on bidding at the sale?

A. That was not entirely my basis. In the meantime I had checked to know the priorities, which I was not too familiar with at the time it first came up, as between the filing of the tax liens in Klamath County on November 2nd and the filing of our mortgage on the previous August the 4th, and that was a part of the reason that I had, together with this letter.

Q. Now, Mr. Balentine, in view of your opinion

(Testimony of U. S. Balentine.)

that their mortgage was prior to the tax liens, you would not in any event have advised them to bid at this tax sale regardless of this mortgage, would you?

A. Well, I had advised them before and gone to the bank with them to make preparations just out of an abundance of caution on the matter, if it didn't cost them too much, if they didn't have to invest too much money.

Q. You still, then, entertained some doubts as to the priority of the mortgage?

A. Not at the last time, I guess. I guess I didn't at the last time. I think I finally concluded that they were prior in time there.

Q. So if they followed your advice they would not have bid at the sale in any event?

A. I don't know that I would have advised them not to bid at [44] the sale, even though I knew it was prior.

Q. Now, the tax liens were filed in Klamath County in November, 1948; that is right, isn't it?

A. November 2nd, I believe, my recollection is.

Q. And this recognition by the corporation of the mortgage was on January 6th, 1949, some two months subsequent? A. Yes.

Q. If some third person had bought this property at the tax sale, do you think that the subsequent recognition by the corporation of that mortgage would have been binding as against that third person? A. Yes, I do.

Q. Do you think that a subsequent ratification

(Testimony of U. S. Balentine.)

of a mortgage would be binding upon someone who acquired through the earlier tax liens?

A. Does that question presuppose that the tax liens were superior? Does that question of yours do that?

Q. I am supposing the actual facts here.

A. All right.

Q. Here we have a mortgage given in August, and we have tax liens filed in November. Then you have a letter written, you say, which in your opinion constituted recognition by the corporation of the mortgage in January. A. Yes.

Q. Now, my question is, under those circumstances would it have [45] been your opinion that the recognition of the mortgage in January would go back ahead of the tax liens in November?

A. I don't think it would affect the priorities as between the two, no. I didn't think so then.

Q. It was your opinion that this mortgage was a valid and prior lien prior to November of 1948?

A. Do you mean it was a prior lien prior to that time, or it was my opinion prior to that time? Is that what you mean?

Q. Well, was it a prior lien prior to that time?

A. Yes, I think it was.

Q. Now, what possible bearing upon your opinion, then, could a letter have which indicated to you that the corporation was recognizing what you say was already a prior lien?

A. It only had this: At the time that it was discussed there at my house, when it was brought over

(Testimony of U. S. Balentine.)

there—my clients were very nervous about these Government liens in reference to their mortgage, and they were anxious, if possible, not to have to be put to the proposition of being confronted with a question of priority between the two.

Q. Has it been your opinion, Mr. Balentine, that the president of a corporation has apparent authority to execute a mortgage of the principal assets without direct authority from the directors?

A. That is not my opinion as a general proposition, but that is my opinion in reference to this particular mortgage. [46]

Q. You did not investigate on behalf of your clients what the express authority of Mr. Camozzi was about company mortgages? A. I did not.

Q. Isn't it a general proposition that more than one corporate officer participates in the execution of a mortgage of this consequence?

A. That is correct.

Q. Isn't it customary in your practice that the corporate seal is attached to an instrument purporting to be executed on behalf of the corporation?

A. That is correct.

Q. Yet neither of those things was done in this instance; isn't that right? A. That is right.

Q. Now, then, again, Mr. Balentine, what significance to you did this letter of January 6th have which led you to the conclusion that the corporation was recognizing the mortgage? Did that mean that there was some doubt in your mind about it prior to that time?

(Testimony of U. S. Balentine.)

A. Well, there probably was in a measure, yes.

Q. Isn't it a fact, Mr. Balentine, that your clients reported to you from the first tax sale that the Government was questioning the validity of the mortgage as far as the personal property was concerned?

A. No, they made no such report to me. [47]

Q. They did not? A. They did not.

Q. You understood they attended the first sale?

A. They did attend, yes.

Q. Now, when Mr. Rudeen bid at the tax sale, isn't it a fact that he bid in his own name?

A. That is correct.

Q. Mr. Ellison asked him if he was bidding in his own name and he said he was?

A. I don't remember that, but I remember afterwards Mr. Rudeen discussed it with me, after the sale.

Q. Did he tell you at that time he was bidding on his own account?

A. He said he had bought it personally, himself.

Q. At that time didn't he tell you that he did not recognize this mortgage? A. No, he did not.

Mr. Leedy: That is all.

Mr. Tongue: No further questions.

(Witness excused.) [48]

GRIFFIN HALE

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

(Testimony of Griffin Hale.)

Direct Examination

By Mr. Tongue:

Q. What is your occupation, Mr. Hale?

A. Well, for about the last five years I have been cruising timber.

Q. Do you know Mr. R. O. Camozzi?

A. Yes, sir.

Q. When did you first meet him?

A. Some time in '47. I don't know; some time in the fall of '47.

Q. Did you ever do any work or perform any services for the Great West Lumber Company?

A. Yes, sir.

Q. At whose request? A. Mr. Camozzi's.

Q. What was the first work that you did for the company and on about what date?

A. I think about December in '47 I began to buy timber for them on commission. In other words, I made a deal for the timber and they bought it, and then I got a dollar and a half for all the timber that I located and bought for them. I made deals, and Mr. Camozzi paid me for the timber; he paid me a dollar and a half for what I got.

Q. Now, between December, 1947, and June of 1948 did you locate [49] any timber for the company as a result of that understanding with Mr. Camozzi?

A. Yes, sir; I did.

Q. Were you present with Mr. Camozzi when any of those deals were closed?

A. Yes, sir, one, at least.

(Testimony of Griffin Hale.)

Q. What was the largest deal that you remember of between those dates?

A. Well, I think it was the stuff that we bought from R. T. Renner, was the biggest deal I ever did close. I am pretty sure that was in April, right about the first of April in '48.

Q. Was that the Lakeview purchase?

A. Yes. We went to Lakeview and Mr. Camozzi gave Mr. Renner a check. He paid off a thousand dollars in a check, and then he would pay him for this timber and leave the thousand dollars up all the time to secure other timber that he would get from him.

Q. What was the total purchase price of that timber, if you remember?

A. Well, we bought what was in Sections 29 and 28, why, we give twelve for it, and what was in 26 and 27 we give ten dollars.

Q. Do you remember approximately what the total purchase price was for that timber?

A. Well, I think around \$10,000 is what he paid for it, what he got out of it. Of course, all I got is my commission. I drew \$1,074 from him on commission. [50]

Q. Mr. Hale, do you know whether or not Mr. Camozzi closed that deal himself?

A. He did. There was nobody else but him on all the other contracts.

Q. Did anybody else have authority to make that purchase that you know of? A. No.

Q. Did he sign the papers himself?

(Testimony of Griffin Hale.)

A. He wrote a check and give Mr. Renner—He wrote him a check for a thousand dollars. He only had one check with him, and there was something else that he had bought, another little patch of timber with forty-some-odd thousand feet. He says, “This is the only check I have with me. I will have to send you another check.”

Q. Mr. Hale, do you recall a forced sale at Pringle Falls?

A. Well, I know of it. I know when they had it, yes.

Q. When was that, do you know?

A. I don't remember. I think it was June.

Q. Early or late in June?

A. I don't really know just the date there. I am not sure it was in June, but that is just my idea about it.

Q. Mr. Hale, were you ever around the mill of the company? A. Yes, sir.

Q. Were you around there on frequent occasions or just infrequently? [51]

A. Oh, I was there two or three times a week, and maybe oftener.

Q. Did you ever see any other officer or director of the company at the mill? A. I never did.

Q. Other than Mr. Camozzi?

A. No, sir; I never did.

Q. Did you ever observe to whom questions were referred for directions or decision?

A. No, sir; I never knew nobody but R. O.

(Testimony of Griffin Hale.)

Camozzi had anything to do with it, as far as I was concerned.

Q. Did you ever hear other people referred to for decisions or directions?

A. No, sir; I did not.

Q. Were you present at the tax sale at which the sawmill was sold to Mr. Rudeen?

A. Yes, sir; I was there at both. I was there from the beginning until the ending of it. I was guard there. I took care of the Government's interests there while they had this seizure.

Q. Do you remember what was done and said at the time of the second sale? Do you remember what was done and said at the meeting in January at which the mill was sold to Mr. Rudeen?

A. I do, I think. I just can't remember just word for word.

Q. Well, just state what you remember as having been said and done and by whom at that time, as you remember it. [52]

A. Well, they called the sale——

Q. Who do you mean by "they"?

A. Mr. Ellison, Mr. Robert Ellison, the Government man, Federal man, from Portland. He called the sale and he read—He had a mortgage, and he read the mortgage there to the public, to the best of my remembrance—I don't know just what it was, but he called for a certain plot of land in Section 13, with a sawmill with two headrigs, edger, and a trimmer, and a number of gasoline engines. I be-

(Testimony of Griffin Hale.)

lieve that is just about the way he read the mortgage.

Q. Did he say anything else that you remember?

A. Well, I really—I just can't recollect right now that I know of. But he might have, but of course——

Q. Do you remember whether Mr. Rudeen said anything at that time?

A. Well, Mr. Rudeen was there at both sales. He was at both of the sales. He bought the lumber the first sale—I think the 27th, the 26th or 27th of December; and on the 27th day of January he bought the mill.

Q. At the second sale at which he purchased the mill do you remember whether or not he made any inquiry as to whether or not the Government would guarantee title to the personal property?

A. He may have, but I just don't really remember that. It seems like there was something said, but I just can't word it, and I wouldn't be safe in stating it if I couldn't state it for sure. [53] At least, there was something said about it, but I really don't know what it was now.

Q. Do you remember whether Mr. Ellison said anything as to what the rights of the purchaser at the sale would be with respect to the mortgage?

A. Well, I believe Mr. Ellison said there was a \$10,000 mortgage, and a new motor that belonged to Moty & VanDyke, and a Ford truck.—It seems like to me that was it—it was not included in the sale; there was some payments to be made on the

(Testimony of Griffin Hale.)

Ford truck, and the motor from Moty & VanDyke, a new motor, that wasn't paid for which was brought out of Deschutes County.

Q. Did he say anything as to whether the purchaser would have to pay the mortgage?

A. Yes, I am sure he included the \$10,000 mortgage above the sale; told them that would have to be prior to the sale.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Mr. Hale, don't you remember at both sales Mr. Ellison said that the Government felt their liens were ahead as far as the personal property was concerned, and that as far as they were concerned the Government felt they could give a title ahead of the mortgage? A. No, sir; I don't.

Q. You don't remember that? [54]

A. He did not. I think the first time no word was mentioned at all about the mortgage, but the last sale he did; he told them all that they would have to pay the mortgage above the Government sale.

Q. You don't remember Mr. Rudeen asking Mr. Ellison if they would guarantee that he would not have to pay the mortgage on the personal property?

A. Mr. Rudeen might have talked to Mr. Ellison out of my hearing about that, I don't know. Not right in my presence, he didn't.

Q. I see. You don't know what conversations went on there when you were not present?

A. They went on and talked, of course, but I

(Testimony of Griffin Hale.)

don't know what they talked about. I heard them bring out the \$10,000, and he read it out in the paper so everybody could hear it.

Q. You knew this Great West Lumber Company was a corporation, didn't you?

A. I know they had it on their mail, but I never seen—I never knew there was anybody in that—I thought Mr. Camozzi and his brother was the only men that was the corporation. I saw his brother one time, and I didn't know there was anybody else.

Q. Well, you didn't know who was in the corporation, did you? A. No, I didn't.

Q. You didn't know these people; there could have been a dozen officers and directors around there and you might not have known it; isn't that [55] true?

A. I saw them later on, after I got there—I saw several of them later when I got to watching that property. I saw Mr. Ramseyer and his son-in-law. They came down, but I didn't know when I was working out there with Mr. Camozzi that they had anything to do with it.

Mr. Leedy: That is all.

Redirect Examination

By Mr. Tongue:

Q. Did you see them there prior to the sale?

A. No, never in my life. I never saw them until the sale, until the Government seized the stuff and put me down there with it.

Mr. Tongue: That is all.

(Witness excused.) [56]

REUBEN E. LONG

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Mr. Long, what is your occupation?

A. Rancher.

Q. Do you know R. O. Camozzi?

A. I do.

Q. Did you ever do any work for the Great West Lumber Company? A. Yes, sir.

Q. In what connection and in what capacity?

A. Well, as a timber purchaser.

Q. Did the company enter into a contract with you to purchase timber on its behalf?

A. Yes, sir.

Q. Is that the contract executed on May 1st, 1948, referred to in this record as Plaintiffs' Pre-Trial Exhibit 22?

A. I presume it is. I haven't seen it.

Mr. Tongue: May it be so stipulated, Counsel?

Mr. Leedy: Yes, I am sure that is right.

Mr. Tongue: Q. Were you present at the sale at which Mr. Rudeen purchased the sawmill of the Great West Lumber Company? A. Yes, sir.

Q. Do you remember anything as to what was said and done at that time? [57] A. Yes, sir.

Q. Would you state to the best of your recollection what was said and done at that time.

(Testimony of Reuben E. Long.)

A. Some of the details, perhaps, are not clear in my mind.

Q. Speak a little louder, will you, please.

A. Perhaps some details of the conversation are not clear in my mind, but I remember clearly that Mr. Ellison, who represented the Government said that he was selling the property subject to a certain mortgage.

Q. Was anything else said or done that you remember?

A. Well, there was considerable other discussion, but I don't feel that it is clear enough in my mind that I could testify to it.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Were you present at both sales, Mr. Long?

A. I was.

Q. Don't you remember at the first sale that Mr. Ellison said the Government felt that their liens were ahead of the mortgage as to the personal property, and that the personal property was very generally described in the mortgage and was too generally described for the mortgage to be good?

A. I remember a discussion about that detail, but I don't believe [58] that I could give it as it was agreed upon.

Q. You remember there was a discussion as to whether or not the mortgage was wholly good?

A. I wouldn't say that. I remember that there was

(Testimony of Reuben E. Long.)

a discussion about a mortgage, and what it covered and what it did not cover and as to priority, and so on, but I don't think that I have clear in my mind what the outcome of that conversation was.

Q. You don't remember now whether Mr. Rudeen asked Mr. Ellison whether the Government would guarantee those property rights as far as this mortgage was concerned?

A. No, I don't.

Q. You are not able to say now whether he did or did not make such an inquiry?

A. That is right.

Q. Or what any answer might have been; is that right?

A. That is right.

Mr. Leedy: That is all.

(Witness excused.)

Mr. Tongue: May it please the Court, Counsel has stipulated that we may submit the deposition of Harry Barry, the secretary of Great West Lumber Company, which was taken in Idaho last week. That has been marked as a pre-trial exhibit and has been included with the other exhibits and made part of the record.

The Court: What is the number of it? [59]

Mr. Tongue: The number of that exhibit is Plaintiffs' Exhibit 19.

The Court: It is already in evidence?

Mr. Tongue: Yes, it is.

The Court: It may be treated as though it were read.

Mr. Leedy: That is satisfactory.

Mr. Tongue: Counsel has also stipulated that, rather than call the Defendant Rudeen as an adverse witness, we may offer in evidence the deposition taken of him yesterday, despite the fact that he is present at this time, for the purpose of expediting the time required for this trial. That is designated as Plaintiffs' Exhibit 20. I might say that that is being transcribed, but we expect that it will be here today and an exhibit number has been reserved for it.

The Court: It may be treated as though read.

Mr. Tongue: That completes our case, except we want to call at some time Mr. Farrens on the question of attorney's fees if plaintiff prevails.

(Short recess.)

Mr. Tongue: If the Court please, Mr. Farrens is here. With the permission of the Court and Counsel, I would like to call him so that we may complete our case.

PAUL P. FARRENS

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Mr. Farrens, you are an attorney-at-law?

A. Yes.

Q. How long have you practiced?

Mr. Leedy: We concede Mr. Farrens' qualifications.

(Testimony of Paul P. Farrens.)

Mr. Tongue: Very well. Counsel, I will ask for a stipulation, for the purpose of framing a hypothetical question to Mr. Farrens, that Mr. Balentine and I, if called, would testify that Mr. Balentine has spent at least sixteen days on this case, including the preparation of the pleadings, conferences with his clients, and investigation of the law and the facts, trips to Portland, and other matters up to the present time; and that I have spent at least eight days in the preparation of the case for trial, in negotiations of the pre-trial order, trips to Idaho, and conferences with witnesses. Would you stipulate that we would so testify, if called?

Mr. Leedy: Based upon your representation to me to that effect, we will so stipulate.

Mr. Tongue: Q. Mr. Farrens, assuming the facts to be true, subject to the stipulation just made—Let me ask you first: Have you examined the pre-trial order and the pleadings in this [61] case?

A. I glanced through the pleadings. I read carefully that portion of the pre-trial order which set forth the contentions of the parties and the issues to be tried, and then I read hastily the voluminous admitted facts.

Q. Based upon your examination of the pre-trial order and such examination as you have made of the pleadings, and assuming for the purpose of this question the facts just stipulated, and bearing in mind the amount of the mortgage involved, the value of the property involved, the difficulty and importance of

(Testimony of Paul P. Farrens.)

the legal questions involved, the amount of time devoted by Counsel to the case, do you have an opinion as to what would be a reasonable attorney's fee for attorneys for the plaintiff in this case in the event that they should prevail?

A. I would have, but your question included the matter of the value of the property sought to be foreclosed against, and I have no knowledge concerning that.

Q. Eliminating that item from the case so far as this question is concerned, then, Mr. Farrens, do you have an opinion as to what would be a reasonable fee?

A. May I ask you one question? Yes, I would have an opinion, but I would need to know one more thing: What, if any, service will be performed by you or Mr. Balentine, if you know, prior to the submission of this case to the Court for final decision?

Mr. Tongue: We anticipate it will be necessary—May I state [62] this for the record?

Mr. Leedy: Oh, yes, of course.

Mr. Tongue: It will, we anticipate, be necessary to prepare a brief for the submission of this case, since we anticipate that it will be so submitted to the Court. We anticipate that it will require probably at least three or four days for the preparation of the opening and reply brief for that purpose.

A. With that additional information, it would be my opinion that \$3500 would be a reasonable attorney's fee, and that anything less than \$2500 would be less than compensatory for the services rendered.

Mr. Tongue: No further questions.

(Testimony of Paul P. Farrens.)

Mr. Leedy: No questions.

(Witness excused.)

Mr. Tongue: That completes our case, your Honor.

Mr. Leedy: If your Honor please, with reference to this matter of attorney's fees, we would like to leave the matter without further testimony, with this understanding: That by not producing testimony we do not necessarily concede the opinion of the witness to be correct. We are willing to leave the matter to the discretion of the Court, and I understand that arrangement to be satisfactory with Counsel, if it is with the Court.

The Court: Yes. [63]

Mr. Tongue: That is satisfactory.

DEFENDANT'S TESTIMONY

CARL RUDEEN

one of the Defendants herein, was thereupon produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leedy:

Q. You are the Carl Rudeen who is a defendant and cross-claimant in this litigation?

A. Yes, sir.

Q. You are a director of the Great West Lumber Corporation, and it is admitted you have been since June 25th, 1948; is that correct?

(Testimony of Carl Rudeen.)

A. Yes, sir.

Q. You are a substantial stockholder in the company? A. Yes, sir.

Q. Are you also a creditor? A. Yes, sir.

Q. Now, when you became a director, Mr. Rudeen, what was your then belief as to the general financial condition of the Great West Lumber Corporation?

A. I considered it good.

Q. Was a dividend voted at the meeting in June,—June 25th, 1948? A. Yes, sir. [64]

Q. When did some question occur in your mind as to the financial condition of the company?

A. Well, I became a little bit suspicious in about the first of September.

Q. Do you recall a meeting of the Board of Directors on November 15th, 1948, as shown by the minute book? A. Yes.

Q. Do you recall the occasion at that meeting—That is admitted here—of the appointment of an executive committee? A. Yes, sir.

Q. You were one of the members of that committee, were you? A. Yes, sir.

Q. When did that executive committee first meet?

A. On November the 17th.

Q. Of 1948? A. 1948.

Q. Last year. At that time was Mr. Camozzi present? A. Yes, sir.

Q. Prior to the meeting of the Board of Directors on November 15th, had the general management of the company been entrusted to Camozzi?

(Testimony of Carl Rudeen.)

A. Yes, sir.

Q. And the minutes which are admitted here show that on November 15th the directors divested him of those powers of management; is that [65] right?

A. Yes, sir.

Q. At the time of the meeting on November 17th of your executive committee did this statement which is in evidence here as Defendant's Exhibit 30-b come up for consideration by your executive committee?

A. Yes, sir.

Q. Now, what did your executive committee do during the period immediately following their meeting on November 17th?

A. Well, after we had found—November the 17th was really the first that we had learned of the bad condition in which this company was in, and immediately after finding that out, why, we took steps to—in one way or another to try to save the company or to reorganize, to continue to operate the mill in the future.

Q. Was consideration given to an RFC loan?

A. Yes, sir.

Q. Was an application made?

A. Yes, sir.

Q. What was the ultimate disposition of it?

A. Well, that was finally turned down.

Q. About when, if you remember?

A. Well, that was turned down—That was turned down in—Well, it was just ahead of the first sale or ahead of the second sale. I can't quite remember. That was turned down, I believe—No, in December;

(Testimony of Carl Rudeen.)

about December the 20th.

Q. Of 1948? [66] A. Yes.

Q. Was any effort made to postpone the tax sale, to get this tax sale postponed?

A. The first one?

Q. Yes. A. Yes.

Q. Were you able to have it postponed without being called for sale?

A. Well, we just didn't have any money available to bid the first sale in, but we were unsuccessful in having the sale postponed, because they went through the procedure.

Q. What is the financial position of the Great West Lumber Corporation today?

A. Oh, it is very bad.

Q. Does it have any assets? A. No, sir.

Q. Roughly, how much money does it owe?

A. Well, in the neighborhood of about—

Mr. Tongue: Just a moment. May I ask the purpose for which this testimony is offered?

Mr. Leedy: This testimony is directed toward the dispute set forth in the pre-trial order relating to the activities, actions, motives, and so forth, of Mr. Rudeen during the period subsequent to November 15, 1948.

Mr. Tongue: Very well. [67]

Mr. Leedy: Q. Was it in excess of \$100,000?

A. Yes.

Q. At this time, in your opinion, is the company hopelessly insolvent? A. Oh, yes.

Q. When did you arrive at the opinion that it was

(Testimony of Carl Rudeen.)

hopelessly insolvent?

A. Well, we arrived at that at about December the 20th.

Q. After December 20th, 1948, did you participate in any actions designed to work out the salvation of the corporation within its own structure?

A. No, that procedure was previous to December the 20th. We had give up the idea of saving the old company by December the 20th.

Q. Were you present at a meeting of stockholders on December 20th, 1948? A. Yes.

Q. Are you familiar with the recital in there with reference to the formation of a group for the raising of money to bid at the sale? A. Yes, sir.

Q. At that time were you and Mr. Ramseyer appointed by the stockholders at that meeting as a committee to see what could be done with this program?

A. Yes, sir. [68]

Q. Were you present at a meeting of the Board of Directors of that corporation on December 26th, 1948? A. No, sir.

Q. Are you aware of the record of that meeting indicating some effort on the part of the directors to borrow money on behalf of the corporation to pay off the taxes? A. Will you repeat that?

(Last question read.)

A. Yes.

Q. Did you participate in that activity after December 20th?

A. No,—December 26th, you mean?

(Testimony of Carl Rudeen.)

Q. After December 20th did you participate in it?
A. Oh, yes.

Q. In the activity of the Board of Directors. I am not making myself clear, Mr. Rudeen.

A. You was asking me at a meeting of December the 26th, which I wasn't there.

Q. Yes. Did you participate in any action by the Board of Directors growing out of this meeting of December 26th?
A. Oh, yes.

Q. What did you do?

A. Well, we went ahead and we proceeded to make out a letter to try to raise money in order to keep—to bid the sale, which we had decided by that time to bid the property back in at the sale. [69]

Q. Was this in accordance with the program of the stockholders' meeting of December 20th or the directors' meeting of December 26th?

A. Yes.

Q. Which?

A. Oh, which one? Of December the 20th.

Q. Then who wrote this letter which was sent out over your signature on January 6th, 1949?

A. That was Attorney Stephan at Twin Falls.

Q. Had he been the company attorney up there?

A. Yes.

Q. Will you state whether he was the one who had prepared corporate minutes generally during the life of the corporation?
A. Yes, he was.

Q. I call your attention, Mr. Rudeen, to some language in this letter of January 6th, which is Defendant's Exhibit 29-a, as follows: "In order to save

(Testimony of Carl Rudeen.)

a part of the assets of the corporation, a few of us have already contributed to a fund which now amounts to a considerable amount." Also this language: "There is no money in the treasury of the corporation from which payment of any of the above-described debts can be paid, and accordingly it will be necessary for the stockholders and creditors to come to the rescue of the corporation or all of the investments of the stockholders will have been wiped out." Do you recall that language? [70] A. Yes, sir.

Q. Now, what was your intention in sending out this letter over your signature?

A. This letter was written primarily to raise money in order to bid, which we had decided by that time—to bid the property back in at the sale.

Q. Well, when you say "bid it back in" who was going to bid it in?

A. Well, to bid in the—bid at the sale.

Q. For whose benefit? For whose account?

A. That was for the account of the creditors and stockholders of the company.

Q. For any particular ones of those?

A. No.

Q. How about those who put up money? Were they to participate in it?

A. That had lost money, you mean?

Q. No, those who put up money in your group?

A. Oh, yes.

Q. What about those who did not put up money?

A. Well, they wasn't to participate, no.

Q. In other words, this was a program for the

(Testimony of Carl Rudeen.)

benefit of those who put up money for this purpose; is that right?

A. That is right; yes, sir.

Q. When did you first learn that Lilly & Valentine claimed a [71] mortgage on this property?

A. Well, that was at the meeting of November the 17th, our executive meeting.

Q. Were you unaware of the existence of that mortgage before that time? A. Yes, sir.

Q. Did you know that Lilly & Valentine had filed two or three lawsuits against the corporation here in Oregon?

A. I didn't know it at that time.

Q. Had the corporation, to your knowledge, given any express authority to Camozzi to execute this mortgage? A. No, sir.

Q. State whether the directors, to your knowledge, consulted their attorney with reference to the validity of this mortgage? A. Yes, sir.

Q. And what advice did you receive?

A. He advised us that the mortgage couldn't be any good on account that it wasn't approved by the directors of the corporation.

Q. Have you entertained that belief since that time? A. Oh, yes.

Q. In this letter of January 6th, 1949, Defendant's Exhibit 29-a, I call your attention to the following language: "Its mill and millsite"—referring to the Great West Lumber Corporation—"are also covered by a mortgage in the original sum of [72] approximately \$10,000.00." Was it your intention at

(Testimony of Carl Rudeen.)

that time to recognize that mortgage?

A. No, sir.

Mr. Tongue: Just a moment. I object to that. There is no claim that those words are ambiguous, and they speak for themselves.

The Court: I will treat this the same as I did the other. I will receive it subject to the objection.

Mr. Leedy: Q. Were you present at the first time this property was offered for sale?

A. Yes, sir.

Q. At that time was there any mention made or discussion of the Lilly & Valentine mortgage? Just "Yes" or "No." A. Yes.

Q. Now, what mention was made or discussion had at that time, and by whom?

A. Well, Mr. Ellison let us know that this property was covered by a mortgage to Lilly & Valentine, and the discussion at the first meeting wasn't—There was no discussion between him and I at the first meeting, but he did state that the personal property they considered would be covered by that mortgage.

Q. Would be covered by it?

A. No, he said it would not be covered.

Q. Would not be covered by it. At that time was there any reason assigned by him for that statement? Did he say why? [73]

A. Well, not at that meeting; not at that sale, as I recall because we wasn't in a position to bid at the sale anyway, so I wasn't too much interested.

Q. At the time of that first sale had any money been deposited with you under the action of this

(Testimony of Carl Rudeen.)

stockholders' meeting of December 20th, 1948?

A. Not other than what was promised. At that time there was no deposits outside of Mr. Ramseyer's money and my own that we had concluded we was going to put up.

Q. Was Mr. Ramseyer a heavy investor in Great West? A. Yes, sir.

Q. About how large an investment did he have?

A. Oh, \$142,000 altogether.

Q. What was the extent of your investment?

A. Mine run, including the open account or the note, would be \$32,000.

Q. When did you last lend money to this corporation on open account?

A. That was on September the 11th.

Q. What year? A. 1948.

Q. How much money was it? A. \$5,000.

Q. Now, then, the property was not sold at the first time it was offered on December 28th? [74]

A. No.

Q. And you sent out this letter on January 6th, 1949? A. That is right.

Q. Was any money deposited with you pursuant to your letter of January 6th, 1949, Defendant's Exhibit 29-a?

A. After the letter was sent out, yes.

Q. About how much money was deposited with you altogether under those circumstances?

A. That reached a total of \$8900 outside of mine and Mr. Ramseyer's, which wasn't really put up; only promised.

(Testimony of Carl Rudeen.)

Q. Was that deposited with you alone as trustee or with the two of you?

A. Well, the two of us, but I was the most active on account of Mr. Ramseyer had gone to Texas at that time.

Q. Did these checks come to you?

A. Yes.

Q. At that time did you deposit these checks in any bank account? A. No.

Q. What did you do with them?

A. I just held them in my possession.

Q. At that time did you have any funds in your possession belonging to the Great West Lumber Corporation? A. No, sir.

Q. At that time did the Great West Lumber Corporation have any [75] funds, so far as you know?

A. No, sir.

Q. What happened then, after this money was deposited with you?

A. Well, the checks came in at various times, and we had them sent to Mr. Stephan to start with, and in a little while preceding the sale, and getting ready for the sale with these checks, why, I got them from Mr. Stephan. Mr. Ramseyer was in Texas, and just a few days previous to the sale I wired Mr. Ramseyer to make sure that he was still coming in with his money which he promised to, \$10,000, at the time of the sale.

Q. By courtesy of the Bailiff, I hand you Defendant's Exhibits 29-c, -d, -e and -f, and I will ask

(Testimony of Carl Rudeen.)

you whether those telegrams have any bearing upon the situation that existed at that time.

A. Yes, sir.

Q. At the time of the sale on January 27th, 1949, what was the situation as far as Mr. Ramseyer was concerned?

A. He had withdrawn.

Q. What were the conditions under which this money had been deposited with you and Mr. Ramseyer?

A. Well, in the letter, why, we emphasized to these people that Mr. Ramseyer would take the leading part in the operation of the mill. And we also called a meeting of these different people, mostly of whom had put up the money, and also told at the meeting that Mr. Ramseyer would be the operation of the mill with whatever [76] help I could give him under my health condition. And also we pictured that there would have to be raised forty-five to fifty thousand dollars in order to operate the mill. So when Mr. Ramseyer withdrew, that resulted in the fact that we had lost \$20,000 of this contemplated forty-five or fifty, because he was to put up \$20,000, which he promised these people. And we also lost the services of Mr. Ramseyer, which he promised to do in the operating of the mill.

Q. Then at the time of the sale on January 27th, 1949, what was your belief as to whether you could use this money or these checks which had been deposited with you and Ramseyer as trustees for the purpose of bidding at this sale?

(Testimony of Carl Rudeen.)

Mr. Tongue: I object to that question as immaterial, what his belief was.

Mr. Leedy: I think it is proper for the purpose of showing what was done and why it was done.

The Court: I am inclined to think that I will let it go in. As a matter of fact, there was a good deal of this I let go in on the other side, so I think this will balance it.

Mr. Tongue: Very well.

Mr. Leedy: Q. Do you understand the question?

A. No; I didn't even understand the Judge.

The Court: That is not necessary.

Mr. Leedy: Will you read the question.

(Last question read.) [77]

Mr. Tongue: Just a second. Is this the second sale you are referring to?

Mr. Leedy: Yes.

A. Well, immediately I consulted with Mr. Stephan, the attorney there at Twin Falls.

Q. Then what was your belief, Mr. Rudeen, at the time of the sale?

A. My belief was that the fact that this money had been gathered, especially through the mails and through the representations of this letter that Mr. Ramseyer would take the leading part in the operation of the mill, I figured it was a false representation to these people after Mr. Ramseyer had withdrawn.

Q. What would be a false representation?

A. This letter was a false representation, because we had represented to them that Mr. Ramseyer would

(Testimony of Carl Rudeen.)

put in at least \$20,000 and be in the operation of the mill.

Q. Under those circumstances what was your belief as to whether you could use the money?

A. Well, I believed that we daresn't use the money.

Q. Then coming to the actual sale itself, what discussion or mention, if any, was made of the Lilly & Valentine mortgage at the sale on January 27th, 1949?

A. That is at the sale?

Q. Yes.

A. Well, after Mr Ellison had read off the property list which [78] he was selling and got down to the point of offering it for sale, why, after he had read this, he also stated that there was a mortgage against this property by Lilly & Valentine, and then it was the belief of the Internal Revenue Department, the attorneys of the Internal Revenue Department, that none of the personal property of the sale would be covered by this mortgage. And I asked him immediately after he quoted that if he would guarantee that this personal property would not be covered by the mortgage. "Well," he says, "we will back it up with our legal staff." "Well," I says, "that doesn't do me much good." I says, "Couldn't you guarantee that that mortgage does not cover the personal property?" And at that time he said, "Yes, I will guarantee that."

Q. Then what happened?

A. He went ahead and offered it for sale, and of course asked for a minimum bid of \$12,500.

(Testimony of Carl Rudeen.)

Q. We are not concerned about the details unless they involve this mortgage, Mr. Rudeen. It is admitted here that you became purchaser at that sale.

A. Yes.

Q. Now, was anything said at that time about your capacity or for whose account you were making this purchase?

A. Yes, sir.

Q. What was said, and by whom?

A. Mr. Balentine, when I made the first bid, which was \$5,000, asked me—— [79]

Q. You mean Mr. Balentine?

A. Mr. Ellison asked me if I was bidding that in behalf of the trustees or individually. I says, "I am bidding that individually."

Q. Were the certificates of sale issued to you individually?

A. Yes, sir.

Q. Then after you had become the successful bidder, I take it you wrote—It is admitted here that you wrote this letter of February 17th, 1949, which is in evidence here as Defendant's Exhibit 29-b. You recall that?

A. Yes, sir.

Q. What was your purpose in sending out that letter?

A. The purpose in sending out that letter was to recover these funds that we dare not use in bidding at the sale, and asking them to come back and participate in forming a new organization.

Q. At that time did you want these people to come in and participate?

A. Oh, yes; very much so.

Q. At that time were you willing to turn over the

(Testimony of Carl Rudeen.)

benefit of whatever there might be in this purchase which you had made? A. Yes, sir.

Q. Now, did you get any response to this letter of February 17th? A. Yes, sir.

Q. What response did you get?

A. They all gave me powers of attorney to go ahead and use the same checks that I still had in my possession, excepting one. [80]

Q. At that time what was Mr. Ramseyer's position in the matter?

A. He then cut his fund down to \$5,000, which he sent finally with a promise that he would contribute another five, but not over \$10,000.

Q. What ultimately became of the program which you were working on in your letter of February 17th, Defendant's Exhibit 29-b?

A. Well, I was waiting all this time for Mr. Ramseyer to come back from Texas, and before he did—or after he came back from Texas, why, he withdrew his money again and told me that he would not participate in the operation of the mill.

Q. What is the fact as to whether your second plan had been predicated upon his management?

A. That is right; the same thing.

Q. Then what did you do with this money which you had in your possession?

A. I returned the checks to each of the fellows that I had, and I wrote them a letter and asked them to participate.

Q. Are you referring now to this letter, a copy

(Testimony of Carl Rudeen.)

of which is in evidence here as Defendant's Exhibit 29-c? That is a handwritten letter.

A. Yes, sir.

Q. In response to that letter was any money put in your hands as trustee for the purpose of operating this mill? A. No, sir.

Q. At this time do you hold any money of any person whomsoever [81] that has been put up with you as trustee or otherwise in connection with this purchase? A. No, sir.

Q. Whose funds are in those certificates of purchase in that sale? A. My own.

Q. Now, going back here just a little bit, Mr. Rudeen, to the meeting of stockholders of December 20, 1948, at that time was there any discussion of the Lilly & Valentine mortgage?

A. That is the stockholders' meeting?

Q. Yes. A. Yes, there was.

Q. And referring to the meetings called in your letter of January 6th, were those meetings actually held? A. Yes.

Q. Now, there was one called, according to this letter, for January 12th, 1949, at the Park Hotel, Twin Falls, Idaho. Were you present at that time and place? A. Yes, sir.

Q. Were there any interested persons there?

A. Oh, yes.

Q. How many attended?

A. I believe we figured about thirty.

Q. Were they stockholders or creditors, or both?

(Testimony of Carl Rudeen.)

A. Stockholders mostly. There may be a creditor or two. [82]

Q. Were any of those present at that meeting among those who ultimately put up the money?

A. Yes.

Q. Were any of those at the meeting on December 20th among those who put up money?

A. Well, you are talking about the December 20th meeting now?

Q. No, I am talking about the meeting on January 12th at the Park Hotel at Twin Falls.

A. Oh yes. They put up money.

Q. Some of them there put up money?

A. Yes.

Q. Were any of those at the stockholders' meeting on December 20th among those who put up money? A. Yes.

Q. Did you attend this meeting which was called for January 15th, 1949, at the Deschutes County Court House in Bend? A. Yes.

Q. Were there any persons present at that meeting? A. Yes, sir.

Q. About how many?

A. There were about twenty.

Q. Were they stockholders or creditors?

A. Well, I believe all creditors.

Q. Did any of those people deposit money with you on this program? [83] A. No, sir.

Q. Was there any discussion at the meeting of January 12th at the Park Hotel about the Lilly & Valentine mortgage? A. Yes, sir.

(Testimony of Carl Rudeen.)

Q. What discussion was had there concerning it?

A. Well, we explained to them about the mortgage. A few of the directors were there, and we told them how the mortgage was and related that the by-laws called for the approval of any mortgage to be approved by the Board of Directors, which this wasn't, and that we considered that the mortgage would be illegal.

Mr. Tongue: This was on the 16th?

Mr. Leedy: This was the meeting of January 12th.

Mr. Tongue: In Idaho?

Mr. Leedy: In Idaho.

Q. Was there any discussion at the meeting in Bend on the 15th about the mortgage?

A. Yes, sir.

Q. What discussion was had there?

A. The meeting there, we related—or I did; I was the only director there at that time—I related to them that we figured the Valentine mortgage wasn't any good on account of it had not been approved by the Board of Directors.

Q. Did you still have faith in the operation of this sawmill, the Great West Lumber Corporation?

A. Yes, sir. [84]

Q. You believed it could be operated at a profit?

A. Yes, sir.

Q. What was your purpose in all of this activity, then, in which you engaged that you have related here?

A. Well, my whole activity most all winter was

(Testimony of Carl Rudeen.)

to try and get the mill into operation again, to make profits to offset our losses.

Q. Was it your purpose or intention to acquire that mill at less than its fair value?

A. No, we were willing to bid a fair value at the sale.

Q. From what source, then, did you expect to recoup your losses?

A. By the operation of the mill.

Mr. Leedy: You may cross-examine.

Cross Examination

By Mr. Tongue:

Q. Mr. Rudeen, you have testified that you didn't know about this mortgage until November of 1948; is that right? A. November the 17th, yes.

Q. Did you know that the mortgage was recorded in Klamath County in the early part of August?

A. We learned it at that time. We learned that it was recorded at that time.

Q. You learned in November that it was recorded in August; is that right? A. Yes, sir. [85]

Q. Now, you say that later you discussed the mortgage with your attorney, and you decided that it was invalid because it was not authorized by the Board of Directors? A. That is right.

Q. When was that discussion?

A. Oh, I would say we discussed that with him more than once. That was from December the 17th on.

Q. After you first learned of the mortgage in No-

(Testimony of Carl Rudeen.)

vember did you and the other directors take any action with reference to the mortgage?

A. No, sir; not that I know of. I at least didn't know it.

Q. None of the directors took any action with reference to the mortgage, did they?

A. I don't think they did.

Q. And no action was taken on behalf of the corporation after the directors learned of the mortgage in November, according to your testimony, did they?

A. Well, I wouldn't know what you include in action there. You mean legal action?

Q. Well, did you communicate with Lilly & Valentine, the holders of the mortgage, in any way after you learned of the mortgage?

A. Well, not until after the sale.

Q. After the sale did you communicate to Lilly & Valentine any of your doubts as to the validity of the mortgage?

A. Yes, sir. [86]

Q. When? A. The day after the sale.

Q. The day after the sale?

A. With Mr. Valentine. I never approached Lilly and Valentine.

Q. That was the day after the sale?

A. Yes. I am quite sure it was the day. If it wasn't, it was the second day after the sale.

Q. Now, you say that Mr. Stephan advised you on the writing of these letters and as to these various attempts at reorganization and rehabilitation of this business; is that right?

A. He only wrote and helped dictate the first let-

(Testimony of Carl Rudeen.)

ter. The second and third letter was my own dictation.

Q. Did you consult Mr. Stephan after writing the first letter?

A. After writing the first letter?

Q. After writing the first letter, yes.

A. About what?

Q. About what you should do with reference to the use of these funds?

A. Oh, yes.

Q. Didn't he advise you continuously?

A. What?

Q. Didn't he advise you continuously? That is, as to what you should do?

A. Yes, sir.

Q. Concerning this plan and how to try to work it out? [87]

A. Yes, sir; more or less.

Q. Was he not at that time the attorney for the Great West Lumber Company?

A. Well, I don't think that he considered that he was attorney. He had been connected as attorney for the Great West.

Q. Had he ever been discharged as attorney for the Great West Lumber Company?

A. Not that I know of.

Q. Now, you testified that you estimated that forty-five or fifty thousand dollars would be necessary for the purpose of bidding in this property; is that right?

A. Well, for the bidding in and the operation for a short period.

Q. I see.

(Testimony of Carl Rudeen.)

A. We figured two weeks' operation.

Q. What did you figure it would cost to operate the mill for that period?

A. We figured the first two weeks' operation we wanted a reserve of \$20,000, for two weeks' operation.

Q. What were you going to use the other \$25,000 for? A. For the purchase of the mill.

Q. You say that you were willing to pay a fair price for the mill? A. That is right.

Q. What did you consider the mill worth at that time? [88]

A. Well, I had made up my mind before the sale that I would not bid—I wouldn't bid the \$10,000. As a matter of fact, I figured \$7500 was a fair price for the mill.

Q. What were you going to do with the difference between \$7500 and the twenty or twenty-five thousand dollars?

A. Well there was some accounts that had to be taken care of there in preparation to get ready to operate.

Q. Didn't that include this mortgage, Mr. Rudeen? A. No, sir.

Q. I call your attention to Defendant's Pre-Trial Exhibit 30-c, which purports to be a list of accounts payable as of December 15, 1948. I call your attention to the fact that Lilly & Valentine is listed as one of those accounts. A. Listed as what?

Q. As one of those accounts.

A. Yes, sir.

(Testimony of Carl Rudeen.)

Q. Was it a fact, then, that they were considered at that time as being owed the amount shown in that exhibit?

A. It was shown on this—This is a list that Camozzi made up. We asked Camozzi—This was what we was trying to get for nearly a month, the final figures on how much this corporation owed. And even this wasn't final. If you will note at the bottom there, we still added in pencil marks as we learned about other accounts, and the total amount finally resulted to about \$150,000.

Q. As shown there by your pencil additions; isn't that right?

A. What?

Q. As shown by your pencil additions?

A. Yes.

Q. But you didn't strike anything out, did you?

A. Out of this here?

Q. Yes.

A. No, sir. We reviewed it and we did find that most of the accounts was understated here. That is, not most of them, but I would say quite a few of them.

Q. That is the list that was used as a basis for sending out those letters to creditors and stockholders, was it not?

A. No, sir.

Q. You don't deny, however, that your letter of January 6th was sent to Mr. Lilly and Valentine?

A. Yes, sir; it was. We used—I want to state we used this list to get the names of the creditors.

Q. That is what I mean.

A. In order to send them the letter. That is, for name only.

(Testimony of Carl Rudeen.)

Q. What bills did you plan to pay?

A. Only those that was necessary to operate.

Q. What were those bills? Can you name them?

A. Well, for one we figured that we would have to give Moty & VanDyke a few hundred dollars in order to use their motor out there at the mill installed, for one. And I can't recall too many. There was title notes on some of the—title notes on [90] some of the office supplies that had to be paid immediately, and there was a title note on the Ford truck that we wanted to pay to bring that up to date.

Q. In what amount? What were you going to pay on that?

A. Well, the amount of the bill was \$2700, but I believe it took right at a thousand dollars to bring the payments up to date.

Q. Anything else? A. Yes.

Q. What else?

A. I just can't recall. Oh, there was several items there that was necessary to clean up in order to operate. And, besides that, we figured that we would have to have a few men there to get our mill ready for a year's operation, which we figured in the neighborhood of a thousand dollars.

Q. Wasn't that included in the other item that you referred to as being necessary to operate for two weeks? A. Yes, that is right.

Q. Rather than in this item of money that you were going to devote to paying bills?

A. Well, we didn't aim to pay—We didn't aim to

(Testimony of Carl Rudeen.)

pay only the bills that we had to pay in order to start operation.

Q. Isn't it a fact, now, Mr. Rudeen, that at the time this letter of January 6th was sent out you intended to pay Lilly & Valentine's mortgage?

A. No, sir; absolutely not.

Q. You still say that although in your letter it is stated that the property was subject to a mortgage for \$10,000——

A. Yes, sir; I do say that.

Q. ——you did not advise the stockholders and creditors of your position that the mortgage was invalid, did you?

A. We had to relate that there was a mortgage on this property to these people. We couldn't deny that there was a mortgage recorded, but we couldn't write them a letter and then have them come back and find out that there was a mortgage here recorded.

Q. But previously you had been advised by your attorney that the mortgage was void, hadn't you?

A. He didn't say it was void. He said that is wasn't a legal mortgage.

Q. That is right. A. Yes.

Q. He had advised you that it was not a valid mortgage? A. That is right.

Q. And yet, after that advice, you wrote to these stockholders and creditors and told them that there was a mortgage in the amount of \$10,000 on your property; is that right?

A. We had figured that we would probably have to go through court to prove that that was an invalid

(Testimony of Carl Rudeen.)

mortgage. We couldn't do anything else, only let the creditors know that there was a mortgage on [92] that.

Q. Did the people that left money with you ask that it be returned?

A. I didn't get straight on that.

Q. Did the people that contributed money, left it with you as trustee, ask that the money be returned to them? A. Did they ask for it?

Q. Yes. Was it their idea or your idea that the money be returned?

A. No, that was their idea.

Q. Did they write to you and request that?

A. No, but some of them stopped their checks at the bank. There was some wrote, also.

Q. You still had over \$7500 of that money at the time of the sale, did you not?

A. At the time of the sale?

Q. Yes. A. Yes, sir.

Mr. Tongue: Your Honor, rather than encumber the record in view of the lateness in time, we have taken the deposition of this witness and if we may refer to that it will be sufficient for cross examination of this witness.

Redirect Examination

By Mr. Leedy:

Q. Just about one or two questions in redirect. Mr. Rudeen, whose obligations are these that are listed on this statement of [93] December 15th which you have before you? A. Great West.

(Testimony of Carl Rudeen.)

Q. And will you state whether or not in raising this money you contemplated buying the open accounts of the Great West Lumber Corporation?

A. Only those that—to save the property that was tied up in the mill. They had title notes, only title notes, that they was to use that property.

Mr. Leedy: That is all.

Recross Examination

By Mr. Tongue:

Q. I have two questions I overlooked, Mr. Rudeen. You testified that you consulted your attorney before the sale as to the validity of this mortgage, isn't that right?

A. Yes, before the sale.

Q. And you say that at the sale you asked Mr. Elison if he would guarantee that the personal property would go to you under the tax sale free from the mortgage?

A. He voluntarily told that first. He voluntarily—He is the way that was: He voluntarily told—I didn't ask him about the personal property; he volunteered that and told me that the mortgage would not cover the personal property, and then I asked him if he would guarantee that.

Q. Yes.

A. But I had to ask him the second time before he related that [94] he would.

Q. Now, when you got the tax certificates from the Government for that sale designated as Defendant's Pre-Trial Exhibits 27 and 28, was there any refer-

(Testimony of Carl Rudeen.)

ence in those certificates to any such guarantee?

A. No, sir.

Q. Didn't they simply purport to sell the taxpayers' interest, such as it was, in the property?

A. Well, I don't know. They were selling—

Q. When you saw those certificates without any guarantee did you ask Ellison to rewrite them and put the guarantee in the certificates?

A. No, sir.

Mr. Tongue: That is all.

Mr. Leedy: That is all.

(Witness excused.)

CHARLES SCOTT

was thereupon produced as a witness in behalf of the Defendant Rudeen and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leedy:

Q. Where do you reside, Mr. Scott?

A. Riverside, California.

Q. Were you employed by the Great West Lumber Corporation? A. Yes.

Q. Over what period of time?

A. From the inception of the corporation until it went out of existence.

Q. That would be from about November of 1946 until what time? A. Until December of 1948.

Q. And what was the nature of your employment by that corporation?

(Testimony of Charles Scott.)

A. I was employed as bookkeeper for the corporation until January of 1948, and after that time I was in the field as Mr. Camozzi's assistant.

Q. Will you state whether or not you were generally familiar with the corporate activities at this sawmill in Klamath County, Oregon? A. Yes.

Q. Now, by courtesy of the Bailiff, I hand you Defendant's Exhibit 25, purporting to be the levy of December 9th, 1948, upon [96] the personal property out there. I hand it to you so that you will have before you the list of personal property which was admittedly sold by the Government under that levy on January 27th, 1948. I would like to ask you to go down the list of the personal property and say with respect to each item whether that is a part of the sawmill or whether it is a part of some machine in the sawmill, or whether it is something apart from the sawmill. In that connection I also, if the Marshal will help me, hand you the mortgage to Lilly & Valentine, Plaintiffs' Exhibit 10, which describes, I think, some of the major items in the sawmill. Then, if you will take that first item on the tax sale list—That is 350,000 feet of lumber; is that correct? A. Yes.

Q. Now, would that be any part of the sawmill?

A. No.

Q. 1948 Ford truck.

Mr. Tongue: Just a moment. May it be understood that we do not concede the propriety of this testimony, but since it may be of some assistance in clarifying the matter, we are willing to let it go in for what it may be worth.

(Testimony of Charles Scott.)

Mr. Leedy: I would like to state for the record, if I may, the purpose of this testimony is this: That the Court will notice among the issues and the contentions of the parties the question of the sufficiency of the description in the Lilly & Valentine mortgage. If it should be held to be a valid mortgage [97] and the Court is called upon to make a decree of foreclosure, the Court will need to identify the items which would be included in that decree. And Mr. Scott knows what these items are, and whether they are a part of the sawmill, and he can tell us what they are better than anyone else. It seems to me that both from the standpoint of the plaintiffs as well as ourselves and the Court it would be very helpful.

Mr. Tongue: This witness is simply an accountant. He is not a sawmill operator. We do not concede his qualifications to express those opinions but, as I say, we are willing to let the testimony go in for whatever it may be worth.

The Court: Received subject to the objection.

Mr. Leedy: In view of Mr. Tongue's attitude, I will take up a different line of testimony and abandon that.

Q. Mr. Scott, out at that sawmill of the Great West Lumber Corporation were there substitutions of items of machinery and equipment from time to time? A. Yes.

Q. Can you recall any major substitution or replacement which was made after August 4, 1948?

Mr. Tongue: Counsel, there is just one item, and it is the subject of stipulation in our pre-trial order, as I recall.

(Testimony of Charles Scott.)

Mr. Leedy: I think this is in line with the issues, Your Honor.

The Court: All right. [98]

The Witness: Would you state the question again?

Mr. Leedy: Whether there was any major change or replacement in equipment after August 4th, 1948?

A. One major change was the replacement of the 140-horsepower Hercules motor, which was replaced by a new motor from Moty & VanDyke at Bend.

Q. What happened to the old motor?

A. The old motor was turned in to be rebuilt.

Q. Do you know whether the new motor was purchased outright?

A. It was purchased on a sales contract to the First National Bank at Bend.

Q. Could you identify that new and old motor if they appear on this list in the exhibit which you hold in your hand?

A. Only the new motor. I don't believe the old motor is listed here, because it was not present on the premises at the time this was made. The new motor, I believe, is this 140-horsepower Hercules motor.

Q. Now, referring to the mortgage, to the first item, "2 circular saw headrakes." Do you know what a headrake is?

A. No. They must refer to a headrig.

Q. Can you designate upon the list, the detailed list of personal property, the items which would be

(Testimony of Charles Scott.)

included under the description "Circular saw head-rigs"?

A. Yes. The items which read, "Small head rig and carriage," and "Big head rig and carriage."

Q. Referring to the last item on that page, "1 double head." Does that have anything to do with a headrig?

A. "1 double head." I can't identify that. It seems like it might be a duplication.

Q. Then the next item above it, "Steam Nigger."

A. That is part of your large headrig.

Q. Can you pick out any other items on that list of personal property which would be included in "Circular saw headrigs"?

A. No, I cannot.

Q. And the item referred to in the mortgage as "Edger," can you pick that out in the list of personal property?

A. Yes. The edger is referred to here in about the middle of the page.

Q. By the same term, "Edger"?

A. Yes, edger.

Q. And the term, "Automatic trim saw" in the mortgage, do you find that in the list?

A. Just below the edger there is an item "Trim Saw."

Q. That would be the same item?

A. Yes.

Q. The next item in the mortgage is "Conveyors" and "Conveyor Chains," two items. Can you identify on the list of personal property the items that would be so described?

(Testimony of Charles Scott.)

A. "Waste Conveyor," but that is all.

Q. Now, directing your attention to the item about the center [100] of the first page of the list of equipment, "Log haul chain and equipment," is that part of the sawmill proper? A. Yes.

Q. What about these "2 boilers, straw burners," down there? Are they part of the sawmill property?

A. The two boilers actually was on the outside of the building. However, they are the power that generates the function of the large headrig.

Q. Directing your attention to the second page of the list of personal property, "1942 Diamond T truck," and "1936 Dodge truck." Would those be part of the sawmill?

A. Well, I expect that those are not a part of the sawmill.

Mr. Leedy: Does that apply also to the Caterpillar and the other items on that page, the office equipment?

Mr. Tongue: Yes.

Mr. Leedy: Q. Is there an item of "Pond saw" anywhere in that list of personal property?

A. I don't see any designation of pond saw. It may be this Wisconsin 6-horsepower motor, air-cooled—I believe that is the pond saw motor. However, that is the only description made of it here. That might be it.

Q. Was there any substitution or addition made out there in the summer of '48 in connection with the boilers or the steam supplies?

(Testimony of Charles Scott.)

A. There was an auxiliary boiler added late in the summer of 1948. [101]

Q. Are you able to say whether or not that was before or after August 4th?

A. I am not able to say definitely. It was near that date, however.

Q. Were there any minor replacements made at about that time?

A. None, with the exception of belts and routine replacements in machinery.

Mr. Leedy: That is all.

Cross Examination

By Mr. Tongue:

Q. Mr. Scott, referring to the list of personal property which has been placed in your hands, I call your attention to the item entitled "Hercules 3 kilowatt generator." Do you know what that piece of equipment is?

A. I don't see it here. Let's see—Oh, yes; right at the top. That is a motor generator that was used to generate the lights, the light plant for the mill.

Q. It was a part of the mill, was it not?

A. No, it wasn't set inside the building. In fact, this motor set probably 100 feet away from the building.

Q. The mill could not be operated without it, could it?

A. Not when the lights were needed.

Q. Now, the next item, "1 Koehler 1½-kilowatt generator,"—What was that item?

(Testimony of Charles Scott.)

A. That was an auxiliary generator which was used in connection [102] with the one which you have mentioned above.

Q. They are for the same purpose?

A. Yes.

Q. Now, referring to this item, "1 Model HXE6-cylinder motor stand and transmission." Do you know what that was?

A. I am not able to identify that.

Q. Isn't it a fact that there were several motors used for the operation of various equipment in the mill?

A. Yes.

Q. And isn't it a fact that this is one of those motors?

A. It could be.

Q. Isn't it a fact that the next four items, including the 120-horsepower motor, 120-horsepower motor, 35-horsepower clutch, and the Hercules motor and the Convey motor, were all used to operate equipment that was a part of the mill?

A. They were used in the function of the mill.

Q. Now, "Red Seal motor for log haul," wasn't that used for the hauling of logs into the mill?

A. That was used to raise logs from the pond into the mill.

Q. And, as such, it was a part of the mill, was it not?

A. Yes, it was a part of the mill operation.

Q. And then the items, "Chrysler industrial 8-cylinder motor," and "Green chain motor,"—Weren't those motors used to operate machines that were part of the mill?

A. Yes. [103]

(Testimony of Charles Scott.)

Q. And isn't it a fact that the green chain which is referred to here, capacity 80,000 feet, is a conveyor?

A. Ordinarily your conveyor is used to—is referred to as to convey the waste material from the mill.

Q. The green chain is part of the mill, isn't it?

A. That is right.

Q. You couldn't operate a mill without a green chain? A. No.

Q. Now, this Wisco 6-horsepower motor, and the two water pumps, and motor jammer following that,—isn't it a fact that those pieces of equipment were also used to power machinery in the mill?

A. No, this Wisconsin motor, this 6-horsepower motor was used as a pond saw motor, I believe.

Q. Was it that rather than the 22-horsepower Wisconsin motor that was the pond saw motor?

A. Yes, I believe that is correct.

Q. So you correct your previous testimony?

A. I believe I stated the Wisconsin 6-horsepower motor.

Q. Then the 22-horsepower motor was used in the mill; is that right?

A. Yes, I believe that is correct.

Q. And the water pumps and the motor jammer for log haul were used in connection with the mill?

A. They were used to discharge logs from the logging trucks, [104] to discharge logs from the trucks into the mill pond.

Q. I see. Now, the lathe machines, were those

(Testimony of Charles Scott.)

used in connection with the operation of the mill?

A. They were in the mill; in the shop.

Q. I see. Were they used to repair mill equipment?

A. They were used in that capacity whenever possible.

Q. Now, the "Single head," is that a repetition of the reference to the headrigs, or is that another piece of equipment?

A. I believe that is a repetition of the above.

Q. Now, "Saws and filing equipment,"—Does that refer to saws used in the mill and filing equipment to keep those saws in condition?

A. Yes. They were the saws—they were replacement saws which were kept there at the mill to replace saws in the event that there was a damage to the saws, and the filing equipment was part of the shop equipment.

Q. That is all with reference to the saws used in the mill? A. Yes.

Q. And the "Aluminum covered mill building,"—That is the building that houses the mill?

A. That is the building; that is correct.

Q. Was that on skids? A. No.

Q. Was it attached to the real property?

A. It was. It had a cement foundation for the pillars, which it [105] was set in.

Q. Were these motors bolted to the building, or fastened in any way to the building?

A. Only, I believe, by the bolting—I believe the motors, as a general rule, were also placed on a concrete foundation.

(Testimony of Charles Scott.)

Q. Bolted down? A. Yes.

Q. Bolted down to the concrete foundation?

A. Yes.

Q. Now, this "Jammer mounted on Mack frame."

What is that? Is that used in logging?

A. That was used in the logging.

Mr. Tongue: Yes. That is all.

Mr. Leedy: That is all.

(Witness excused.)

Mr. Leedy: That is the Defendant Rudeen's case, Your Honor.

Mr. Tongue: I think that we covered the matter in our direct case, and I have no further rebuttal to offer, so that completes the testimony.

Now, Your Honor, if it meets with the approval of the Court, I think counsel are willing to submit this matter on briefs in any manner that you may suggest.

The Court: Well, I have no convenience, particularly, but the convenience of the attorneys. I won't be able to reach this [106] for some little time.

Mr. Tongue: May we have two weeks to file an opening brief, with two weeks to the defendant to file an answering brief, and we have two weeks to file a reply brief?

Mr. Leedy: That is satisfactory.

The Court: That is agreeable, and then if I feel after that length of time that I still require oral argument I will notify you.

Mr. Tongue: Very well.

Mr. Leedy: We will be happy to argue the matter, if the Court wishes us to, at any time.

Mr. Tongue: As I understand it, and I think it should be a part of the record, it has been stipulated and agreed by and between counsel, and it is my understanding, with the approval of the Court, that these proceedings today do not close the record, and that the plaintiffs reserve the right, if necessary or advisable, to bring in other parties or conduct further proceedings as against the Great West Lumber Corporation itself.

Mr. Leedy: That is correct. Your record so shows, I believe.

The Court: If that is not in the pre-trial order, I think it should be put in there.

Mr. Tongue: In the pre-trial order it states this: "The Great West Lumber Corporation appearing not, and it having been stipulated that, if necessary, further proceedings may be had against said defendant or that additional parties be brought in."

The Court: If that is an agreement, I think that is sufficient.

Mr. Leedy: Yes, I do.

The Court: You will amend the pre-trial order, then, with the suggestions that the Court made this morning as to their being no issue as to payment of the mortgage, and no issue of the presence of per-

sonal property in this county, and you may write those in.

Mr. Leedy: I understood from Mr. Tongue earlier that there has been a small credit on this mortgage, and I think the record does not show it and should show it, if you have that figure, Mr. Tongue.

Mr. Tongue: Yes. We are willing to stipulate that there was an overpayment on the open account for hauling of logs after the execution of the mortgage in the amount of \$453.37, which is entitled to be credited and has been credited on the mortgage. \$300.00 of that amount has already been set forth and is alleged as a credit in the complaint filed in this case.

(Whereupon proceedings in the above matter on June 8, 1949, were concluded.)

[Endorsed]: Filed August 1, 1949. [108]

[Endorsed]: No. 12910. United States Court of Appeals for the Ninth Circuit. Carl Rudeen, Appellant, vs. R. G. Lilly and M. M. Valentine, doing business under the assumed name and style of Lilly & Valentine Trucking Company, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed April 25, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12910

CARL RUDEEN,

Appellant,

vs.

R. G. LILLY and M. M. VALENTINE, doing busi-
ness under the assumed name and style of Lilly.
& Valentine Trucking Company,

Appellee.

STATEMENT OF POINTS

The appellant states that the Points upon which he intends to rely are the same as those that were filed in the District Court of the United States for the District of Oregon and the Points filed in said District Court are hereby adopted in as full and ample manner as if copied verbatim herein.

Dated: June 1, 1951.

/s/ WALTER H. ANDERSON,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 4, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court:

Carl Rudeen, appellant above named, hereby designates the portion of the record to be contained in the record on appeal in the above entitled matter the same as the designation filed with the Clerk of the District Court of the United States for the District of Oregon, and said designation as filed in the District Court of the United States for the District of Oregon is hereby adopted as the designation of the record in this Honorable Court.

Dated: June 1, 1951.

/s/ WALTER H. ANDERSON,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 4, 1951. Paul P. O'Brien,
Clerk.